Supreme Court, U.S.
FILED
APR 8 1980
MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1571

CHRISTOPHER MCGRATH, JR.,

Petitioner,

v.

STEVEN JOHN SLOTKIN, an infant by his mother and natural guardian, CHARLOTTE SLOTKIN, and CHARLOTTE SLOTKIN, as Executrix of the Estate of Bert Slotkin, deceased,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOSEPH A. BERGADANO
HART & HUME
10 East 40th Street
New York, New York 10016
(212) 686-0920
Counsel for Petitioner
Christopher McGrath, Jr.

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	3
Questions Presented	3
Constitutional Provisions Involved	4
Statement of the Case	4
Reasons for Granting the Writ	10
Point I—The Court of Appeals failed to give full faith and credit to the state court's judgment settling the infant's claim in the state court action	10
Point II—The Court of Appeals violated the principles established in *Erie R.R.* v. *Tompkins* by failing to apply the laws of New York State with respect to the scienter requirement for fraud	15
1. Waiver	17
2. Scienter	19
Conclusion	22
Appendix	
Opinion of the District Court	A1
Judgment of the District Court	A17
Opinion of the Court of Appeals	A20
Order on Petitions for Rehearing	A68
Order Decling Action on Suggestion for Rehearing *In Banc*	A74
Order Extending Time to File Petition for Writ of Certiorari	A76

TABLE OF AUTHORITIES

PAGE

Cases:

Alleghany Corporation v. Kirby, 218 F.Supp. 164, *aff'd*, 333 F.2d 327 (2nd Cir. 1964), *cert. dismissed* 384 U.S. 28 (1966) 11
American Surety Company v. Baldwin, 287 U.S. 156 (1932) 13
Angel v. Bullington, 330 U.S. 183 (1946) 16

Bose v. Wehrli, 186 Misc. 325 (Sup. Ct. 1945) 12
Burgundy Basin Inn, Ltd. v. Watkins Glen Grand Prix Corp., 51 A.D.2d 140 (1976) 20
Byrnes v. National Union Insurance Company, 34 A.D.2d 872 (1970) 18

Cagliotti v. Medi-Cab, Inc., 52 A.D.2d 544 (1976) 11
Cobb v. Hatfield, 46 N.Y. 533 (1871) 18
Crouse v. McVickar, 207 N.Y. 213 (1912) 11

Erie R.R. v. Tompkins, 304 U.S. 64 (1938) 3, 15, 16
Ernst and Ernst v. Hochfelder, 425 U.S. 185 (1976) 21

Farraro v. Stripekis, 60 A.D.2d 861 (1978) 11

Glogowski v. Rapson, 20 Misc.2d 96 (Sup. Ct. 1959) 10
Grossman v. Kass, 124 N.Y.S.2d 416 (Sup. Ct. 1953) (n.o.r.) 12

Holm v. Shilensky, 388 F.2d 54 (2nd Cir. 1968) 13

Kelly v. Otis Elevator Company, 283 App. Div. 363 (1954), *aff'd*, 308 N.Y. 805 (1955) 18
Kingman v. Col. v. Stoddard, 85 Fed. 740 (7th Cir. 1898) 18
Krichmar v. Krichmar, 42 N.Y.2d 858 (1977) 11

PAGE

Naujokas v. H. Frank Carey H.S., 57 Misc.2d 175, *rev'd on other grounds*, 33 A.D.2d 703 (1969) 12

Rooker v. Fidelity Trust Company, 263 U.S. 413 (1923) 13

Slotkin v. Citizens Casualty Co. of New York, 447 F.Supp. 253 (S.D.N.Y. 1978) 2
State Street Trust Company v. Ernst, 278 N.Y. 104 (1938) 19
Strong v. Strong, 102 N.Y. 69 (1886) 18

Tomasello Bros., Inc. v. Friedman, 57 Misc.2d 817 (Sup. Ct. 1968) 12

Ultramares Corp. v. Touche, Niven and Company, 255 N.Y. 170 (1931) 19

Valdimer v. Mount Vernon Hebrew Camps, Inc., 9 A.D.2d 900 (1959), *aff'd*, 9 N.Y.2d 21 (1961) 11, 17
Vale v. Reynolds, 118 N.Y. 297 (1890) 18

Wayside Transportation Company v. Marcell's Motor Express, 288 F.2d 864 (1st Cir. 1960) 13
Will of Silver, 72 Misc.2d 864 (1st Cir. 1973) 12
Winters v. Lavine, 574 F.2d 46 (2nd Cir. 1978) 13

Statutes:

28 U.S.C. 1254 (1) 3
28 U.S.C. 1738 ..... 3, 13
New York Civil Practice Law and Rules, Section 1207 and Rule 1208 .....6, 10, 11, 17

Miscellaneous Sources:

26 Cornell Law Quarterly 149-153 (1943) 10
23 New York University Law Quarterly 164-166 (1941) 10

IN THE

Supreme Court of the United States

October Term, 1979

No. .....

CHRISTOPHER MCGRATH, JR.,

Petitioner,

v.

STEVEN JOHN SLOTKIN, an infant by his mother and natural guardian, CHARLOTTE SLOTKIN, and CHARLOTTE SLOTKIN, as Executrix of the Estate of Bert Slotkin, deceased,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Christopher McGrath, Jr. respectfully prays for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on August 29, 1979, its order and opinion entered December 10, 1979 on his petition for rehearing and on the order entered January 31, 1980 on his petition for rehearing *in banc* in this case. Petitioner is informed that John McGrath, Citizens Casualty Company of

New York and American Mutual Insurance Company of Boston intend to file petitions for a writ of certiorari in this matter also. Petitioner joins in all questions presented and reasons which shall be advanced by those parties for granting the writ to the extent that such questions and reasons are not adverse to his interests. Additional appellees before the Court of Appeals were Guaranty Reinsurance Company, Allstate Insurance Company, Urbaine Fire Insurance Company, Arkwright-Boston Manufacturers Mutual Insurance Company, Hardware Mutual Casualty Co., National Casualty Co. (all of whom, together with American Mutual Insurance Company of Boston, are hereafter collectively referred to as the "reinsurers" or the "reinsurance companies"), George Berkowitz and Paul Ratner. Additional parties who may retain an interest in this litigation are Morrell Goldberg and Bernard Fuss, both citizens of New York, and Brookdale Hospital Medical Center, a New York corporation, having its principal place of business in New York, who were and remain cross-claim defendants only in the action.

Opinions Below

The opinions of the Court of Appeals (A 20) not yet reported and the orders denying petitioner's petition for rehearing and suggestion for rehearing *in banc*, also not yet reported (A 74, 76), and the opinion of the United States District Court for the Southern District of New York (A 1), reported at 447 F.Supp. 253 (S.D.N.Y. 1978), appear in the Appendix.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit, entered on August 29, 1979, reversed the judgment of the United States District Court for the Southern District of New York dismissing the complaint against petitioner Christopher McGrath, Jr. A timely petition for rehearing was denied on December 10, 1979 by a written opinion and order which appears in the Appendix, and petitioner's suggestion for rehearing *in banc* was denied on January 31, 1980 (A 74). Mr. Justice Marshall, by order dated February 29, 1980, granted petitioner an extension of time to and including April 8, 1980 in which to file the instant petition (A 76). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

Questions Presented

(1) Whether the Court of Appeals violated the statutory mandate of 28 U.S.C., Section 1738 and the United States Constitution by refusing to grant full faith and credit to a valid judgment of a state court.

(2) Whether the Court of Appeals violated the principles established in *Erie R.R.* v. *Tompkins* by failing to properly apply the law of the State of New York in adjudicating a state-law created fraud cause of action arising under its diversity jurisdiction.

Constitutional Provisions Involved

United States Constitution, Article IV, Section 1, provides, in pertinent part, as follows: "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Amendment X to the United States Constitution provides, in pertinent part, as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people."

Statement of the Case

In this diversity case, the infant respondent and his father ("plaintiffs") originally commenced an action in the Supreme Court of the State of New York, Kings County, against a hospital and the estates of two physicians claiming injuries due to medical malpractice. Prior to the trial, the plaintiffs settled their claims against the two doctors' estates for a total of $20,000. Just before the case was assigned for trial, the hospital's insurance carrier (Citizens Casualty Company) retained the firm of McGrath, Cohen & McGrath to defend the hospital in that case (A 5). Petitioners Christopher McGrath, Jr. and John McGrath in this action (two of the three partners in the aforesaid firm) were the hospital's trial counsel in the state court trial. The matter came on for trial in early 1971. During the trial of

that action settlement negotiations were conducted among the parties. Ultimately, during the course of the plaintiffs' case, the action was settled by the parties. It is the nature of the statements made with respect to the settlement and the state trial court's judicial order approving the settlement of the infant's claim that give rise to this federal action for fraud.

At the start of the state court trial and at the request of plaintiffs' counsel, the plaintiffs' counsel was informed by petitioner Christopher McGrath, Jr. and defendant George Berkowitz (a hospital trustee and hospital counsel) that the hospital had only $200,000 of insurance coverage, written by Citizens Casualty Company, the hospital's insurer (A 6). ($150,000 of that coverage was reinsured by the reinsurers.) Subsequent to the above conversations, but also during the trial, defendant Paul Ratner, Citizen Casualty's Claim Manager, arrived at the court and also stated that the hospital had only $200,000 of insurance coverage (A 33).

Just shortly before the close of the plaintiffs' case in the state court trial and after several days of settlement discussions, the plaintiffs agreed to settle their claims for $185,000, which was within the stated insurance policy limits. A stipulation of settlement was entered on the record (but not formally approved by the Court at that time), and the jury dismissed (A 31). Approximately 14 days later it was discovered that the hospital had "excess" insurance policies totaling $1,000,000 which covered the period of time when the alleged medical malpractice concerning the infant plaintiff and his mother occurred, and that there were several letters in Citizen Casualty's file stat-

ing that there was such excess insurance, although not giving the amount thereof (A 32-34). That discovery was made by defendant Ratner when he received a telephone call from the excess insurance carrier's counsel. When later questioned about the matter, it was Ratner's testimony that he had forgotten about the excess insurance (A 33). At that point the trial judge had not yet approved the settlement of the infant's claim by signing the "infant's compromise order" required pursuant to New York Civil Practice Law and Rules ("CPLR") Section 1207 and Rule 1208 (A 34). Ratner promptly informed petitioner Christopher McGrath, Jr. of the additional insurance who, in turn, immediately advised that state court trial judge and plaintiffs' counsel of the additional insurance coverage which the hospital had.

The trial judge then called a conference in which the plaintiffs' attorney, the hospital's attorneys, the "excess" insurance carriers' attorneys and others all participated. At that time an offer was made to plaintiffs' attorney to retry the case in virtually any manner in which it possibly could be done, i.e., *ab initio* with a new jury, or to continue the trial without a jury before the trial judge on the original record and exhibits, or to have a new jury trial on the basis of the record and exhibits in the original trial without the plaintiffs being required to produce any additional proof (unless they wished to do so) (A 35-37).

Despite the urging of the state court trial judge that the plaintiffs retry their case, plaintiffs' counsel rejected all offers, alleging that the plaintiffs could not proceed to a new trial because they allegedly had "exposed their hand", because the infant plaintiff's mother was ill, because

the plaintiffs could not afford the cost of a new trial and because he allegedly could not get the doctors who testified on behalf of the plaintiffs at the original trial to come back and testify again. He and the plaintiffs insisted that the plaintiffs be permitted to proceed with the settlement and that the plaintiffs would thereafter sue all parties involved in a federal court action for fraud (A 37). Three months after the original "settlement" was placed on the state trial court's record, with full knowledge of all of the foregoing facts and at plaintiffs' counsel's and the plaintiffs' insistence, the state court trial judge signed an "infant's compromise order" approving the settlement for the sum of $185,000. That order contains no mention or condition of any further action or proceeding by the plaintiffs against anyone, or anything else of any like, kind or nature whatsoever.

A few months thereafter the plaintiffs commenced the instant diversity action for fraud in the United States District Court for the Southern District of New York against the hospital, the "excess" insurers, the "excess" insurers' legal counsel, the hospital's administrator and deputy administrator, Citizens Casualty Company, Citizens Casualty's reinsurers, Ratner, Berkowitz, Christopher McGrath and John McGrath. Plaintiffs claimed that the representations which had been made to plaintiffs' attorney as to the hospital's insurance coverage by the defendants during the negotiations for settlement of the state court action constituted a fraud. The damage aspect of the fraud action was the difference between the amount of money ($185,000) which plaintiffs received on the settlement with the hospital and the alleged settlement value of the case had plaintiffs and their counsel been informed that the

actual insurance coverage for the hospital was $1,200,000. There was no "federal" cause of action or question involved in the diversity action.

At the time of trial of the federal action only Citizens Casualty, its reinsurers, Ratner, Berkowitz and the two McGraths remained as defendants to the plaintiffs. Prior to the trial the plaintiffs had consented to dismissal of the action against the hospital, its administrator and deputy administrator, the "excess" insurers and those insurers' attorneys, all of whom had originally been named as defendants by the plaintiffs. However, the hospital and its two administrators remained in the action as cross-claim defendants to other defendants only. At the end of the plaintiffs' case in the trial below, the Court dismissed the action as to the reinsurers, leaving only Citizens Casualty, Berkowitz, Ratner and the two McGraths as defendants when the case went to the jury. The action was tried before Hon. Milton Pollack, District Judge.

The jury's verdict was in the total amount of $680,000 in favor of the plaintiffs. Subsequently, the District Judge granted the defendants' motions for judgment n.o.v. in a written opinion for the reasons set forth therein, a copy of which opinion is in the Appendix (A 1).

On appeal by the plaintiffs, the United States Court of Appeals for the Second Circuit reversed and reinstated the verdict as to all of the remaining defendants except Berkowitz by a 2-1 decision, with a strong dissent by Van Graafeiland, J. The Circuit Court denied the applications for reargument and rehearing and denied suggestions that the matter be considered *in banc* (A 68, 74).

The majority of the Circuit Court held, *inter alia*, that the law of New York is that one who has been induced by a fraudulent misrepresentation to settle a claim may sue for and recover damages for fraud without rescinding the settlement, despite knowledge of the actual facts before entering into the settlement.

In his petition for rehearing, petitioner Christopher McGrath, Jr. restated the argument that the New York court's "infant's compromise order" approving the settlement had the effect of a judgment under New York law and could not be collaterally attacked in the federal court action. The Circuit Court again rejected that argument and stated that the New York law permitted the plaintiffs to sue on their new cause of action for fraud in the procurement, which was not barred by the prior, judicially approved settlement and which was not *res judicata* (A 69-70).

It is respectfully submitted that the Circuit Court misconstrued and misapplied New York law with respect to fraud and failed to give full faith and credit to the prior state court judgment which is binding on the parties in this action.

Reasons for Granting the Writ

POINT I

The Court of Appeals failed to give full faith and credit to the state court's judgment settling the infant's claim in the state court action.

The Circuit Court, by reversing the District Court and permitting the plaintiffs to maintain this diversity fraud action after the "infant's compromise order" had been entered in state court, has seriously impaired the constitutional and statutory rights protecting state court judgments. The effect of such a decision could cause a substantial influx of cases in the federal courts seeking what would amount to a "second bite of the apple" in the federal courts after plaintiffs have settled or lost at the state court level and a judgment entered to that effect. In this instance particularly, the Circuit Court has completely disregarded the order of a state trial judge which judicially approved the settlement of the infant's underlying state court action.

In New York, as in other jurisdictions, infant plaintiffs are wards of the court. *Giogowski* v. *Rapson,* 20 Misc.2d 96 (Sup. Ct. 1959). Accordingly, New York, in protection of its infants, long ago enacted statutes designed to insure the rights of infants in the prosecution of litigation claims.*

The present New York rules on settlement of infants' claims are currently contained, in part, in the New York Civil Practice Law and Rules (CPLR), Section 1207 and

* For general background history of New York statutory law with respect to infants' actions, see 26 Cornell Law Quarterly 149-153 (1943) and 23 New York University Law Quarterly 164-166 (1941).

Rule 1208, which require that settlement of an infant's claim *must* be approved by a judge on application to the court, supported by affidavits of the infant's representative and attorney setting forth certain specified facts. The settlement is then independently reviewed by the court and, if it is acceptable to the court, an order is entered pursuant to CPLR 1207 settling the infant's claim. Such an order "shall have the effect of a judgment." CPLR 1207; *Krichmar* v. *Krichmar*, 42 N.Y.2d 858 (1977).

The New York law is explicitly clear that there cannot be any settlement of an infant's claim without independent judicial approval as evidenced by the court's "infant's compromise order." *Farraro* v. *Stripekis*, 60 A.D.2d 861 (1978); *Cagliotti* v. *Medi-Cab, Inc.*, 52 A.D.2d 544 (1976); *Valdimer* v. *Mount Vernon Hebrew Camps, Inc.*, 9 A.D.2d 900, *aff'd*, 9 N.Y.2d 21 (1961). Without such an "infant's compromise order" any proposed or proported "settlement" of an infant's claim is unenforceable and uncollectable. Conversely, a signed "infant's compromise order" has the effect of a judgment and may be enforced in a court of law.

It is a further settled principal of law in New York (as elsewhere) that a valid judgment is immune from collateral attack. *Crouse* v. *McVickar*, 207 N.Y. 213 (1912); *Alleghany Corporation* v. *Kirby*, 218 F.Supp. 164, *aff'd*, 333 F.2d 327 (2nd Cir. 1964), *cert. dismissed* 384 U.S. 28 (1966).

Stated another way:

> "it is a settled policy of the law not to allow the effectiveness of a judgment to be impeached in another lawsuit, even where perjury and fraud were used to pro-

> cure it. The remedy for that lies exclusively in the lawsuit itself, for instance, by a motion for a new trial." *Tomasello Bros., Inc.* v. *Friedman,* 57 Misc.2d 817 (Sup. Ct. 1968).

Consequently, the New York courts have held that an infant's compromise order signed by a judge is equally safe, absent fraud by the guardian at litem, from subsequent direct or collateral attack. *In re Will of Silver,* 72 Misc.2d (Surr. Ct. 1973); *Grossman* v. *Kass,* 124 N.Y.S.2d 416 (Sup. Ct. 1953) (n.o.r.).

It is undisputed that the instant plaintiffs not only failed to appeal or even question the infant's compromise order signed by state trial judge which is here involved, but that they affirmatively insisted that it be signed by the trial judge. Of even greater importance is the fact that at that time both the plaintiffs and the state court judge were fully apprised of the actual facts of the alleged "fraud" committed by the defendants, and that the compromise order was nevertheless signed by the state court judge with full knowledge of those facts. The signing of the order (judgment) by the state court judge under those circumstances constituted an independent judicial determination that the settlement of the infant's claim was fair and reasonable in the premises and in the best interests of the infant. *Naujokas* v. *H. Frank Carey H.S.,* 57 Misc.2d 175, *rev'd on other grounds,* 33 A.D.2d 703 (1969); *Bose* v. *Wehrli,* 186 Misc. 325 (Sup. Ct. 1945).

Despite the state court's approval and determination that there was a full, fair and adequate settlement of the infant's claim and despite the fact that the infant, his

attorney and guardian had full opportunity to relitigate their original claim in the state court in any one of several ways as they might elect, if they wished to do so, the plaintiffs insisted upon accepting the settlement and then bringing the instant fraud action in the federal court while retaining the proceeds of the settlement. By permitting this suit to be maintained the Circuit Court has seriously infringed upon the judicial powers of the state courts which are protected by the United States Constitution. It has been a long-standing principle, as codified by 28 U.S.C. Section 1738, that:

> "the . . . judicial proceedings of any court of any state . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such state . . . from which they are taken."

28 U.S.C. Section 1738, is, of course, the statutory enactment which applies the "full faith and credit clause" of the Constitution (Article IV, Section 1), to the federal court system with respect to state court judgments. *American Surety Company* v. *Baldwin,* 287 U.S. 156 (1932); *Rooker* v. *Fidelity Trust Company,* 263 U.S. 413 (1923); *Winters* v. *Lavine,* 574 F.2d 46 (2nd Cir. 1978); *Wayside Transportation Company* v. *Marcell's Motor Express,* 288 F.2d 864 (1st Cir. 1960).

In a similar situation, in *Holm* v. *Shilensky,* 388 F.2d 54 (1968), the Second Circuit rejected the plaintiff's claims based on a state court judgment incorporating a settlement which allegedly was procured by fraud. The claims there involved the value of two paintings which were part of a settlement agreement which, in turn, was incorporated into

the state court decree. In that case, the plaintiff alleged that the true value of the paintings was far less than had been represented at the time of the settlement. She also claimed that the fraud was not discovered until long after the decree (judgment) had been entered. New York law also applied in that case. In rejecting the plaintiff's claims there, the Circuit Court stated:

> "Thus, in order properly to compute damages under these five causes of action the district court would have to second-guess the Nevada divorce court by determining whether the Nevada court would have provided a different property settlement arrangement if the true worth of the paintings were known at the time of the decree, and, if so, to what extent it would have been different. This clearly would be an impairment of the Nevada decree."

We respectfully submit that the same reasoning applies in the instant case, only more so, since the Circuit Court majority's decision here results in an impairment of the New York court's judgment settling an infant-plaintiff's claim and is contrary to the settled New York law. By allowing the federal courts to, in effect, ignore the state court's judgment (infant's compromise order), the Circuit Court's decision creates an effective way to allow plaintiffs multiple opportunities to litigate and relitigate the same claims and permits an action to be brought in federal court which impermissibly collaterally attacks a state court judgment.

The grant of a writ is especially appropriate in this case because the Circuit Court's decision would impose a substantial burden upon the federal court system. The

decision opens the door for every state court litigant to seek a way in which to gain access to the federal court by attacking the state court's judgment under the guise of a fraud action. The problem is particularly acute in this instance because the settling of infants' claims occurs almost daily in every court in the United States. To permit such collateral attacks would open the proverbial "flood gates" to new litigation in the federal courts on cases previously settled in state courts.

Given the plain inconsistency of the decision and the prescribed mandate of this Court and Congress that full faith and credit must be given to state judgments, we respectfully submit that this case is ripe for summary reversal and remand to the Circuit Court for reinstatement of the District Court's judgment dismissing the action.

POINT II

The Court of Appeals violated the principles established in *Erie R.R.* v. *Tompkins* by failing to apply the laws of New York State with respect to the scienter requirement for fraud.

This case involves consideration of the responsibility of the federal courts in diversity cases to correctly apply state law and to avoid creating or expanding state-law causes of action. Here the Circuit Court has permitted a fraud action to be maintained in federal court against an attorney acting in his capacity as counsel for a defendant in a state court action. By the Circuit Court's majority's interpretation of the scienter requirement for fraud, they have subjected every attorney in this country to a possible fraud ac-

tion any time the attorney incorrectly states a fact to an adversary, however innocent or without fault he may be. This question is also particularly ripe for consideration by this Court at this time in view of the increasing number of legal actions brought against professionals of all disciplines for alleged constructive fraud due to the professional's alleged failure to investigate his client's activities. The Circuit Court's ruling is of potentially great importance because of the effect which it has to permit fraud actions to be brought against professionals when the professional, such as an attorney or an accountant, has relied upon representations made to him by his client in making representations himself to third parties.

As this Court is all too well aware, in the exercise of the diversity jurisdiction federal courts are mandated to enforce state-created rights and apply the laws of the appropriate state. *Erie R.R.* v. *Tompkins,* 304 U.S. 64 (1938). For the purpose of diversity jurisdiction a federal court is, in effect, only another court of a state. The essence of diversity jurisdiction is that the federal court enforces state law and state policy. What is more important, diversity jurisdiction must follow state law and policy. *Angel* v. *Bullington,* 330 U.S. 183 (1946).

Although it is conceded by all parties and the lower courts that the law of New York applies in this case, it is respectfully submitted that the Circuit Court misconstrued and misapplied the New York law on fraud with respect to two specific issues. One: the Circuit Court misconstrued the New York law on fraud by permitting the plaintiffs to maintain their fraud action even though the plaintiffs insisted on affirming and having judicial approval of the

settlement which allegedly was based upon fraud *after* they had full knowledge of the facts constituting the alleged fraud, which under New York law constitutes a waiver of any fraud of action. Two: the Circuit Court expanded the New York definition of fraud by permitting a party not in direct privity with the actual facts to be found "grossly negligent" for failure to independently ascertain the actual facts when there was no duty to do so.

1. Waiver

Within two weeks after the "settlement" was made during the state court trial and before that settlement had the required state court judicial approval, the instant petitioner, upon learning of the facts concerning additional insurance policies which the hospital had, immediately informed both the trial judge and plaintiffs' counsel of those facts (A 8). At that time there was no "infant's compromise order" which was required for the approval of that "settlement." Despite the offer by the state court trial judge and the defendant's and its insurers' counsel to permit the plaintiffs to retry their case in any one of the several possible ways, plaintiffs' counsel and parents refused and insisted that the state court judge sign the "infant's compromise order" which would then have the effect of a judgment against the defendant in that action. As more fully set forth above, New York law is settled by both statute and decision that the settlement of an infant's claim, such as the instant one, is not effective and binding until the settlement has been approved by order of the trial court and upon certain specific procedures, documents and bases. CPLR 1207; *Valdimer* v. *Mount Vernon Hebrew Camps, Inc., supra.*

The Circuit Court found that the plaintiffs' insistence in confirming the settlement did not amount to a waiver of the "fraud" by relying on New York cases which state that when a victim of a fraud learns of the fraud *after* the transaction has been consummated, he may retain whatever benefits he has received and then maintain an action for damages. *Vale* v. *Reynolds,* 118 N.Y. 297 (1890); *Strong* v. *Strong,* 102 N.Y. 69 (1886); *Byrnes* v. *National Union Insurance,* 34 A.D.2d 872 (1970). However, the New York law which applies in this instance is that if the alleged victim of the misrepresentation learns the truth *before* the transaction is consummated, he may not consummate the transaction, take the benefits and still sue in fraud. If he proceeds with the transaction under those circumstances, he waives the fraud. *Kingman* v. *Col.* v. *Stoddard,* 85 Fed. 740 (7th Cir. 1898); *Cobb* v. *Hatfield,* 46 N.Y. 533 (1871); *Kelly* v. *Otis Elevator Company,* 283 App. Div. 363 (1954), *aff'd,* 308 N.Y. 805 (1955).

The operative words which control in this case are "before the transaction is consummated." As shown above, the "settlement" here involved was not and could not be "consummated" before the infant's compromise order was signed. It was inchoate and unenforceable until judicially approved. Therefore, when the plaintiffs learned of the alleged fraud before the "transaction was consummated" (before the settlement of the infant plaintiff's claim was judicially approved) and still elected to accept the benefits of the settlement, there could not be any fraud at that point. In any event, they waived the prior "fraud" by insisting on proceeding to have the "settlement" judicially approved and become enforceable after having full knowledge of the actual facts involved.

No New York case has been found where the "defrauded" party was fully aware and informed of the facts of the alleged fraud before the settlement or the transaction was consummated and where such party was permitted to then consummate the settlement or transaction and subsequently sue for damages for fraud. By permitting this suit to be maintained despite the waiver of the alleged fraud by the plaintiffs, the Circuit Court violated a basic cannon of our federal system by creating a state cause of action where none existed before. The effect of the decision below is to alter the New York law and to permit a fraud action to be brought in a federal court in New York in any instance when a misrepresentation is made to a party and that party, with actual knowledge that the representation is incorrect, elects to proceed with the transaction. We respectfully submit that is both improper and impermissible.

2. Scienter

The Circuit Court also misconstrued and expanded the New York law with respect to "nonwilful" fraud based on a misrepresentation of a material fact susceptible of accurate knowledge, but stated to be true on personal knowledge of the representor, particularly insofar as petitioner Christopher McGrath, Jr. is concerned.

It has been a long-standing rule in New York that "gross negligence" may be substituted for actual scienter as an element of fraud. See, e.g., *Ultramares Corp.* v. *Touche, Niven and Company,* 255 N.Y. 170 (1931); *State Street Trust Company* v. *Ernst,* 278 N.Y. 104 (1938). Both of those cases involved accountant/auditors retained

for the sole purpose of certifying the accuracy of a client's financial statements. The auditor necessarily had before him and became familiar with the actual books and records before the statement and certification was made. In cases not involving accountants, the "representor" charged with scienter or gross negligence was a principal who unquestionably was perceived by others to be and actually was acting upon his own knowledge, rather than upon knowledge supplied to him by another who had actual, direct knowledge of the facts. See, e.g., *Burgundy Basin Inn, Ltd.* v. *Watkins Glen Grand Prix Corp.*, 51 A.D.2d 140 (1976).

The Circuit Court majority's decision below expanded the New York scienter requirement for fraud in this case by permitting a fraud action to be brought against a defendant who did not have actual, direct knowledge or the means to ascertain the truth of a matter being represented without making inquiry of a third person concerning the matter (as was the case with petitioner) and those circumstances were known to the "defrauded" party. The Circuit Court majority so held despite the fact that there are no New York cases which we can find which hold that an individual is "grossly negligent" in such circumstances.

Petitioner and his firm were retained shortly before trial, and only as trial counsel, to defend the hospital in the state court action. Neither he nor his firm had any first-hand knowledge of the hospital's insurance. It was clear to everyone involved, including and particularly the plaintiffs' counsel, that petitioner actually relied upon his client for the information with respect to their insurance coverage (A 27-28).

The potential effect of the Circuit Court majority's decision here is to create a fraud action where a party relies on the facts given to him by a third party and such reliance is known by all of the parties involved including the party to whom a representation of such facts is made. For example, attorneys in the course of their professional representation of clients must often make various statements with respect to their clients' position and the facts relying on statements to them by the clients. The logical extension of the Circuit Court's ruling is that the attorney may be subject to an action for fraud if the information given to him by the client and stated by the attorney relying thereon to a third party is false or misleading. The impact of such a ruling would be to require every attorney to make an independent investigation of every single statement of fact or allegation which may be made to him by his client under penalty of being subject to liability for fraud if such statement is incorrect. It is respectfully submitted that would create utter havoc in our court system and slow the judicial process to less than the proverbial "snail's pace". It is further respectfully submitted that the granting of the instant petition will both afford this Court an opportunity to remedy the situation created by the Circuit Court majority's decision and also to discuss the requirements of fraud actions in federal courts outside of the statutory limitations and confines of the Securities Acts. See *Ernst and Ernst* v. *Hochfelder*, 425 U.S. 185 (1976).

Conclusion

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari on behalf of Christopher McGrath, Jr. should be granted and the case remanded to the Court of Appeals for the Second Circuit for reinstatement of the District Court's decision dismissing the action with respect to Christopher McGrath, Jr.

Respectfully submitted,

JOSEPH A. BERGADANO
HART & HUME
Counsel for Petitioner
Christopher McGrath, Jr.

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

March 1, 1978.

Steven John SLOTKIN, an infant by his mother and natural guardian, Charlotte Slotkin, and Charlotte Slotkin, as Executrix of the Estate of Bert Slotkin, Deceased, Plaintiffs,

v.

CITIZENS CASUALTY CO. OF NEW YORK, Allstate Insurance Company, American Motorists Insurance Company, American Mutual Insurance Company of Boston, Employers Mutual Liability Insurance Company of Wisconsin, Guaranty Reinsurance Company, Urbaine Fire Insurance Company, Grange League Insurance Co., National Casualty Co., Hardware Mutual Casualty Co., Arkwright-Boston Mfrs. Mutual Insurance Company, Paul Ratner, George Berkowitz, Christopher McGrath, Jr. and John McGrath, Defendants.

No. 71 Civ. 4044 (MP).

On return of a verdict that moving defendants had committed fraud,

inducing plaintiffs to settle a medical malpractice action for less than they otherwise would have obtained, defendants' motions to dismiss the complaint and to direct a verdict in their favor, reserved during trial, and post-trial motions to set aside the verdict and for judgment n.o.v. came before the court. The District Court, Pollack, J., held that: (1) where plaintiffs seeking recovery on charge of malpractice on behalf of an infant alleged that they were unwilling to demand more from defendant hospital than its insurance would cover, yet plaintiffs after learning of additional insurance coverage but before the court's approval of a settlement on behalf of the infant insisted on proceeding with and thereby obtaining execution of the stipulation of settlement, with full knowledge of the facts, plaintiffs were barred from thereafter seeking damages for fraud; (2) the court was not obliged to adhere to another judge's earlier decision in the same litigation, and (3) where the only basis on which the jury was instructed that it could hold insurance company liable was the

theory of respondeat superior with respect to liability of its claims manager, there was no justification for a verdict against the insurer more than eight times as great as against the agent, and such error tainted not only findings as to damages but the entire verdict.

Verdict set aside, judgment n.o.v. directed for defendants, complaint dismissed and judgment entered in favor of defendants.

Arum, Friedman & Katz, New York City, for plaintiffs; by Theodore H. Friedman, New York City.

Granik, Silverman, Sandberg & Nowicki, New City, N.Y., for defendant Citizens Casualty Co.; by David W. Silverman, New City, N.Y.

Julien & Schlesinger, New York City, for defendant Paul Ratner; by Stuart A. Schlesinger and David Jaroslawicz, New York City.

Tell, Cheser, Breitbart & Lefkowitz, New York City, for defendant George Berkowitz; by Seymour Lefkowitz, New York City.

Hart & Hume, New York City, for defendant Christopher McGrath, Jr.; by Joseph A. Bergadano, New York City.

OPINION

POLLACK, District Judge.

A jury has returned a verdict that the moving defendants herein committed fraud, inducing plaintiffs to settle a medical malpractice action for less than they otherwise would have obtained. Now before the Court are defendants' motions to dismiss the complaint and to direct a verdict in their favor, reserved during trial, and post-trial motions to set aside the verdict and for judgment n.o.v.

The following facts have been amply proved, and indeed are uncontested. The infant plaintiff, Steven Slotkin, was born at the Brookdale Hospital in 1963 to a diabetic mother who had been admitted to the hospital in a state of toxemia. Early in his life he was diagnosed as suffering from cerebral palsy. He and father sued the hospital in the New York Supreme Court, Kings County, alleging that Steven's disability stemmed from a condition of acetonuria in the mother due to the negligence of the hospital staff. The case went to trial before Justice Williams in late February 1970.

The hospital had a liability insurance policy issued by defendant Citizens Casualty Company, in the amount of $200,000, which was applicable to the claim. Shortly before commencement of the trial, Citizens retained defendant Christopher McGrath to represent the hospital. Early in the proceedings in the trial court, plaintiffs' counsel, Max Toberoff, Esq. received the impression that the Citizens policy was the only liability insurance covering the hospital and applicable to the claim, and he telephoned the hospital to warn it that it was exposed to a potential liability exceeding its insurance coverage. In response, the hospital sent defendant George Berkowitz, a trustee of the hospital and a lawyer, to the courthouse to protect the institution's interests. As the trial progressed through the plaintiffs' case, the lawyers discussed the possibility of a settlement. On March 4, defendant Paul Ratner, a claims manager for Citizens, arrived at the courthouse and joined the discussions. On the same day, a stipulation settling the case for

$185,000 was read into the record, the Judge orally indicated approval thereof, and the jury was discharged.

Plaintiffs allege, and the jury apparently found, that the individual defendants mentioned above represented to Toberoff, during the settlement negotiations, that the $200,000 Citizens policy was the only insurance applicable to the claim. The jury must also have accepted plaintiffs' allegation that they were unwilling to demand more from the hospital than its insurance would cover,[1] and that therefore they relied on defendants' representations concerning the insurance. Finally, the jury must have concluded that the hospital had an umbrella policy providing a million dollars' worth of "excess" insurance under certain circumstances, with Lloyds Insurers unrelated to Citizens, which was applicable to the Slotkins' claim. The Lloyds group was not notified of the pendency of the trial and did not participate therein or in the

---

1/ Mr. Toberoff testified that he assumed that the hospital could satisfy any judgment that plaintiffs might obtain.

negotiations and stipulation of settlement. The defendants allege that they were unaware at the time of the excess insurance above the primary coverage by Citizens, and the jury was instructed that it could return a verdict for the plaintiffs on a finding that the defendants conveyed a pretense of knowledge when they were recklessly ignorant of the truth.

The following facts are also both amply proved and uncontested. Because it determined the claims of an infant, the settlement stipulation was unenforceable[2] unless it was followed

---

2/ Mr. Toberoff conceded that failure or refusal of the Judge to make and enter a compromise order pursuant to NYCPLR §§ 1207-08 would render the stipulation for settlement unenforceable. Mr. Toberoff testified:

> "He [the Judge] had it in his power to refuse to sign the compromise order ... If he didn't, I would say they by logical operation the stipulation would be rendered valueless ... We wouldn't be able to collect without the compromise order."

Moreover, the trial Judge had the unquestioned power to reject the settlement as inadequate or insufficient for the infant after learning of the existence of excess insurance coverage.

by a judicial order finalizing the arrangement, providing for the distribution of the settlement fund and terminating the suit. NYCPLR §§ 1207-08. Such a judicial order has the effect of a judgment. NYCPLR § 1207.

Within a fortnight after the stipulation was read into the record, and before the requisite order was made and judgment accordingly entered, Ratner was alerted to the existence of the excess insurance coverage. He promptly telephoned McGrath, and McGrath immediately notified Justice Williams and Toberoff. In a conference before Justice Williams, representatives of the excess carriers declined to recognize the settlement stipulation since they had not been aware of the trial, were not represented at the trial and had not participated in the stipulation. The hospital and Citizens offered to drop the settlement stipulation, to recommence trial of the claim before either a judge or a jury, and to permit introduction of the transcript of the medical and any other testimony from the earlier proceeding. The carriers of the excess

insurance offered to appear if the case were retried and to recognize any obligation thereon owing to the hospital if given an opportunity to come in and defend the claim. The Judge, too, urged the plaintiffs to accept the proposals of a retrial made by the hospital, Citizens and the excess carriers, to no avail.

Insisting that retrial would be impractical because no medical experts were willing to testify, and vowing to seek damages for fraud, Toberoff orally and in formal papers demanded that Justice Williams finalize the arrangement, make the requisite compromise order and direct judgment thereby on the settlement stipulation. After considering the matter for over two months, Justice Williams acceded to plaintiffs' demand for execution of settlement arranged, with an order of infant's compromise that does not mention the possibility of a fraud action.[3]

3/ In view of the determination reached hereafter, it becomes unnecessary to construe the effect of the judgment ultimately directed by Justice Williams. The parties are in dispute on whether the Judge's compromise order constituted a settlement value judgment and independent adjudication of the fairness of the settlement, and an expression on the best interest of the infant, the

The compromise was paid thereunder and the funds were distributed as ordered in the judgment. This suit followed. It went to the jury only as against the lawyers, Citizens, which was the primary insurance carrier, and its claims agent. The jury verdict was for the plaintiffs in sums stipulated separately as against each defendant in varying amounts.

The Court finds, as a matter of law, that plaintiffs' insistence on proceeding with and thereby obtaining the execution of the stipulation of settlement with full knowledge of the facts bars this action.

Under the governing law of New York, the victim of fraud generally may, upon learning the truth, affirm and complete performance of the contract, retain whatever benefits he has received thereunder, and maintain an action for damages. Vail v. Reynolds, 118 N.Y.

---

validity of which cannot now be questioned collaterally for error which does not affect the jurisdiction of the Court which rendered it. It is a settled principle that a valid judgment should not be subject to a collateral attack. Crouse v. McVickar, 207 N.Y. 213, 100 N.E. 697 (1912).

297, 302-03, 23 N.E. 301, 303 (1890); Strong v. Strong, 102 N.Y. 69, 73, 5 N.E. 799, 800 (1886); Byrnes v. National Union Insurance Co., 34 A.D.2d 872, 310 N.Y.S.2d 781 (1970). But see Glatzer v. Ax, 63 N.Y.S.2d 551 (Sup. Ct. 1946) (alternate ground). If a victim of misrepresentation learns the truth when performance of the contract has just begun, and he could rescind without significant prejudice, however, he waives the fraud if he proceeds to execute the agreement. See A.G. Concrete Breakers, Inc. v. State, 9 A.D.2d 995, 996, 194 N.Y.S.2d 743, 745 (1959) (alternate ground); Kelly v. Otis Elevator Co., 283 App. Div. 363, 368, 128 N.Y.S.2d 39, 43 (1954), aff'd mem. 308 N.Y. 805, 125 N.E.2d 864 (1955) (dictum); General Valuations Co., Inc. v. City of Niagra Falls, 253 App. Div. 156, 157-59, 1 N.Y.S.2d 880, 882-83, aff'd on this point mem. 278 N.Y. 273, 15 N.E.2d 802 (1938).

Other jurisdictions take the same view. See Simon v. Goodyear Metallic Rubber Shoe Co., 105 F. 573 (7th Cir. 1900); Kingman & Co. v. Stoddard, 85 F. 740 (7th Cir. 1898); Advance Alumi-

num Castings Corp. v. Davenport, 224 Ark. 440, 274 S.W.2d 649 (1955); Lewis v. Carsh, 79 Colo. 51, 244 P. 598 (1926); Christy v. Heil, 255 Iowa 602, 123 N.W.2d 408, 411 (1963) (dictum); Eckstein v. Storck, 199 Iowa 1375, 203 N.W. 796, 797-98 (1925); Defiel v. Rosenberg, 144 Minn. 166, 174 N.W. 838 (1919). Were the rule otherwise, a plaintiff would be able to recover damages for a self-inflicted injury, and exchange the right to rescind for a speculation on a jury's appraisal of his damages. E.g., Thompson v. Libby, 36 Minn. 287, 31 N.W. 52 (1886). Further, it would extend the principle allowing a victim of fraud to complete the contract and sue for damages beyond its original rationale, of assuring that one who is no longer in a position to rescind would not be deprived of all remedy, Gould v. Cayuga County National Bank, 99 N.Y. 333, 337, 2 N.E. 16, 17 (1885).

In the instant case, plaintiffs had not significantly changed position to their prejudice before learning the truth. No such prejudice can be attributed to the difficulties asserted by

Toberoff with respect to retrying the malpractice case. There was no impairment of the facts giving rise to claims of malpractice by the hospital. Under New York law, plaintiffs were required to prove malpractice by the hospital in order to recover for fraud in the inducement of the stipulation of settlement. Urtz v. New York Central & Hudson River R.R., 202 N.Y. 170, 175-76, 95 N.E. 711, 712-13 (1911). Thus, retrying the malpractice case would have been no more burdensome than pursuing this action for fraud. Further, by obtaining a verdict in the present litigation, plaintiffs have proved that such a retrial was indeed practicable.

In reaching this decision, the Court has carefully considered Judge Motley's contrary conclusion at an earlier stage of this litigation, Slotkin v. Brookdale Hospital Center, 357 F. Supp. 705, 707 (S.D.N.Y. 1972). Judge Motley did not have the benefit of a full record, including plaintiffs' demonstration of the practicability of retrying the malpractice claim, when she was required to render a decision. In any

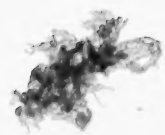
event, the Court is not obliged to adhere to another judge's earlier decision in the same litigation. LeRoy v. Sabena Belgian World Airlines, 344 F.2d 266, 274 (2d Cir.), cert. denied, 382 U.S. 878, 86 S. Ct. 161, 15 L. Ed. 2d 119 (1965) (dictum); Dictograph Products Co. v. Sonotone Corp., 230 F.2d 131, 134-36 (2d Cir.), petition for cert. dismissed per stipulation, 352 U.S. 883, 77 S. Ct. 104, 1 L.Ed.2d 82 (1956) (Learned Hand, J.). The earlier ruling does not relieve this Court of the obligation to present the Court of Appeals with what it believes to be a correct judgment. Schmeider v. Hall, 421 F. Supp. 1208, 1213 n. 6 (S.D.N.Y.), aff'd, 545F.2d 768 (2d Cir. 1976), cert. denied, 430 U.S. 955, 97 S. Ct. 1601, 51 L.Ed.2d 805 (1977); Rodriguez v. Olaf Pedersen's Rederi A/S, 387 F. Supp. 754, 757 (E.D. N.Y. 1974), aff'd, 527 F.2d 1282, (2d Cir. 1975), cert. denied, 425 U.S. 951, 96 S. Ct. 1726, 48 L.Ed.2d 195 (1976).

Accordingly, defendants are entitled to judgment. In the alternative, a new trial is required. The jury returned separate awards of $20,000 a-

gainst McGrath, $60,000 against Ratner, $100,000 against Berkowitz, and $500,000 against Citizens. The verdict is incorrect as a matter of law, for two reasons. First, separate wrongs resulting in a single, indivisible injury, as here, create joint and several liability for the whole harm. Hill v. Edmonds, 26 A.D.2d 554, 270 N.Y.S.2d 1020 (1966); Hawkins v. Goll, 256 App. Div. 940, 9 N.Y.S.2d 924, aff'd mem. 281 N.Y. 808, 24 N.E.2d 484 (1939); Insurance Company of North America v. Lindsey, 83 Misc.2d 495, 498-99, 372 N.Y.S.2d 164, 167 (Sup. Ct. 1975). Second, the only basis on which the jury was instructed that it could hold Citizens liable was a theory of respondeat superior with respect to Ratner's liability. There is no justification for a verdict against Citizens more than eight times as great as that against Ratner. This error so clearly demonstrates that the jury yielded to its sympathy for a severely crippled child, and determined to provide for him without regard for the law, that it taints not only its findings as to damages, but its entire verdict.

The jury's verdict is set aside, judgment notwithstanding the verdict is directed for the defendants, the complaint is dismissed, and judgment shall be entered in favor of the defendants and against the plaintiffs, with costs to be taxes by the Clerk.

SO ORDERED.



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEVEN JOHN SLOTKIN, an infant by his mother and natural guardian, CHARLOTTE SLOTKIN, and CHARLOTTE SLOTKIN, as Executrix of the Estate of BERT SLOTKIN, deceased

Plaintiffs

-against-

CITIZENS CASUALTY CO., OF NEW YORK, et al.,

Defendants

Filed Mar. 6, 1978

71 Civil 4044 (MP)

JUDGMENT

The issues in the above entitled action having been brought on regularly for trial, before the Honorable Milton Pollack, United States District Judge, and a jury, on September 15, 16, 19, 20, 21, 23, 26, 27, 28, 29, 30 and October 3, 4, 5, 6, 7 and 11, 1977, and at the conclusion of the plaintiffs' evidence all the defendants having moved the Court to dismiss the complaint, and the Court having granted the said motions to dismiss made on behalf of all defendants except on behalf of defendants Citizens, Paul Ratner, George Berkowitz

Christopher McGrath and John McGrath, and the jury thereafter having returned a verdict in favor of the plaintiffs, as against defendants CITIZENS, PAUL RATNER, GEORGE BERKOWITZ and CHRISTOPHER McGRATH, and in favor of JOHN McGRATH, and the said defendants having moved the Court for judgment notwithstanding the verdict, and for a directed verdict in favor of the said defendants, and the Court thereafter on March 1, 1978, having handed down its opinion setting aside the jury verdict, and having directed that judgment notwithstanding the verdict be entered for the defendants dismissing the complaint, it is

ORDERED, ADJUDGED and DECREED: That defendants CITIZENS CASUALTY CO. OF NEW YORK, PAUL RATNER, GEORGE BERKOWITZ and CHRISTOPHER McGRATH have judgment against plaintiffs STEVEN JOHN SLOTKIN, an infant by his mother and natural guard-CHARLOTTE SLOTKIN, and CHARLOTTE SLOTKIN, as Executrix of the Estate of Bert Slotkin, deceased, dismissing the complaint on the merits, with costs to be taxed, and it is further,

ORDERED, ADJUDGED and DECREED:

That the complaint be and it is hereby dismissed as to the remaining defendants, with costs to be taxed.

Dated: New York, New York
March 6, 1978

/s/Raymond F. Burghardt
Clerk

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 353—August Term, 1978.

(Argued January 17, 1979 Decided Aug. 29, 1979.)

Docket No. 78-7167

STEVEN JOHN SLOTKIN, an infant by his mother and natural guardian, CHARLOTTE SLOTKIN, and CHARLOTTE SLOTKIN, as Executrix of the Estate of BERT SLOTKIN, deceased,

Appellants,

—v.—

CITIZENS CASUALTY CO. OF NEW YORK, ALLSTATE INSURANCE CO., AMERICAN MOTORISTS INSURANCE CO., AMERICAN MUTUAL INSURANCE CO. OF BOSTON, EMPLOYERS MUTUAL LIABILITY INSURANCE CO. OF WISCONSIN, GUARANTY REINSURANCE CO., URBAINE FIRE INSURANCE CO., GRANGE LEAGUE INSURANCE CO., NATIONAL CASUALTY CO., HARDWARE MUTUAL CASUALTY CO., ARKWRIGHT-BOSTON MANUFACTURERS MUTUAL INSURANCE CO., PAUL RATNER, GEORGE BERKOWITZ, CHRISTOPHER MCGRATH, JR., and JOHN MCGRATH,

Appellees.

Before:

OAKES, GURFEIN, and VAN GRAAFEILAND,
Circuit Judges.

In an action for fraud arising out of representations as to insurance coverage in connection with the settlement of a medical malpractice case, the United States District Court for the Southern District of New York, Milton Pollack, *Judge,* dismissed the complaint against appellees John McGrath and the reinsurance companies and granted judgment notwithstanding the verdict to the other appellees. *Held,* that appellants could maintain their action for fraud without first rescinding the settlement and thus the judgment n.o.v. is vacated except as to one individual defendant; and that the complaint against John McGrath and the reinsurance companies should not have been dismissed.

THEODORE H. FRIEDMAN, Arum, Freidman & Katz, New York, N.Y. (Fred R. Profeta, Jr., Max Toberoff, of counsel), *for Appellants.*

SEYMOUR LEFKOWITZ, Tell, Cheser, Breitbar & Lefkowitz, New York, N.Y. (Solomon M. Cheser, of counsel), *for Appellee Berkowitz.*

JOSEPH A. BERGADANO, Hart & Hume, New York, N.Y. (Leslie F. Ruff, of counsel), *for Appellees McGrath.*

DAVID W. SILVERMAN, Granik Silverman Sandberg & Nowicki, New York, N.Y., *for Appellee Citizens Casualty Co. of New York.*

HOWARD R. COHEN, Bower & Gardner, New York, N.Y., *for Appellee Guaranty Reinsurance Co.*

KENNETH SAGET, D'Amato & Lynch, New York, N.Y. (John P. Higgins, of counsel), *for Appellees Allstate Insurance Co., Urbaine Fire Insurance Co., Arkwright-Boston Manufacturers Mutual Insurance Co., Hardware Mutual Casualty Co., and National Casualty Co.*

DANIEL H. MAHONEY, New York, N.Y. (Kathryn D. Nealon, of counsel), *for Appellee American Mutual Insurance Co. of Boston.*

STUART A. SCHLESINGER, David Jaroslawicz, Julien, Schlesinger & Finz, P.C., New York, N.Y., *for Appellee Ratner.*

OAKES, *Circuit Judge:*

Any personal injuries lawyer knows that the amount of a defendant's assets or insurance coverage is generally a factor to be weighed in evaluating a case for settlement. The instant diversity action is one for fraud, or its legal equivalent; but it arises from a state court malpractice case that the plain-

tiffs, a brain-damaged child and his mother,[1] settled on the record after trial commenced for $185,000, just under the so-called "policy limit." *Slotkin v. Beth-El Hospital,* No. 65-6253 (N.Y. Sup. Ct., Kings County, June 4, 1971) (order approving settlement of March 4, 1971). The Hospital defendant and its primary insurer represented that the policy limit was $200,000 when in fact there was an additional $1 million in excess coverage. Plaintiffs then brought this suit in the United States District Court for the Southern District of New York, Milton Pollack, Judge, under the court's diversity jurisdiction. The jury found certain of the defendant-appellees liable for misrepresenting the insurance coverage. Those defendant-appellees were Citizens Casualty Co. of New York (Citizens), the Hospital's primary insurer; Paul Ratner, Citizens' assistant vice president, who was present at the malpractice trial; Christopher McGrath, Jr., and John McGrath, partners in the firm of McGrath, Cohen & McGrath and nominal trial counsel for the Hospital but actually appearing for the insurers; and George Berkowitz, a Hospital trustee and attorney. The complaint against the insurance companies that had reinsured Citizens' coverage were dismissed by Judge Pollack in the federal trial. The jury awarded damages in the amount of $680,000, representing the difference between the actual settlement in the state action and a likely settle-

---

1 Plaintiffs in the state malpractice action were the infant, Steven John Slotkin, and his father, Bert Slotkin. Bert Slotkin having died before the initiation of the fraud action, plaintiffs in the court below and appellants here are the infant again and Charlotte Slotkin, his mother, as executrix of the estate of Bert Slotkin.

ment amount had there been no misrepresentation of the coverage.[2]

Judge Pollack, however, granted judgment notwithstanding the verdict to appellees. Appellees had argued earlier in the proceedings that, as a matter of law, plaintiffs had waived any claim for fraud by affirming the malpractice settlement after discovering the misrepresentations. Judge Constance Baker Motley had denied appellees' motion to dismiss the complaint on this ground, holding that plaintiffs were entitled under New York law to retain the benefits of the settlement *and* nevertheless to proceed with the fraud action. *Slotkin v. Brookdale Hospital Center,* 357 F. Supp. 705 (S.D.N.Y. 1972).

Judge Pollack's original charge to the jury also stated that as a matter of law plaintiffs had *not* waived their right to sue for fraud. Nevertheless, subsequent to the verdict he reversed his previous holding and also ruled contrary to Judge Motley. He granted judgment to defendants notwithstanding the verdict on the ground that plaintiffs' failure to rescind the settlement and retry the case in state court

---

2 The court's charge was in part as follows:

> The plaintiffs did not sustain any damages unless they had a valid malpractice claim against the Brookdale Hospital. I have already explained to you how to determine whether they had such a valid claim. You must then determine the actual pecuniary loss, if any, suffered by the plaintiffs, that is, the difference between the amount which was actually paid on the settlement in 1971 and the amount which would have been the fair settlement value of the Slotkin case if plaintiffs had not been deceived.
>
> Assuming the parties meant to avoid further litigation and to compromise their dispute and that nothing but true facts were disclosed, how much could plaintiffs reasonably have demanded and the Brookdale Hospital reasonably have allowed as a final compromise? That is the fair settlement value.

when given the opportunity to do so constituted a waiver of the fraud action.

We reverse this grant of judgment to appellees notwithstanding the verdict except as to appellee Berkowitz. We also reverse the alternative holding that appellees are entitled to a new trial because the jury improperly allocated the damage award after it returned a verdict of liability and in response to a request of the court for clarification of the verdict. Additionally, we reverse the lower court's finding of insufficient evidence to support the verdict against defendant John McGrath and its dismissal of the complaint against the reinsurers of Citizens. Because such a result does not permit a single appropriate judgment our mandate is expressed in the alternative.

I. The Facts

A. *Introduction*

Appellants here are Steven John Slotkin and his mother, Charlotte Slotkin. Mrs. Slotkin, a diabetic, gave birth to Steven at Brookdale Hospital Center, then Beth-El Hospital, on November 16, 1963. Steven sustained brain damage at birth which his doctors diagnosed as congenital cerebral palsy. As a result of the brain damage, he is paralyzed, confined to a wheelchair, and will require constant care for the rest of his life. Plaintiffs claimed, and the jury in the action below subsequently found, that the Hospital's failure properly to administer insulin to Mrs. Slotkin during the period immediately preceding delivery had caused Steven's brain damage.

B. *The State Court Proceedings*

In order to understand the issue of waiver, the principal issue that all appellees raise, it is necessary to detail what happened in the state court proceedings. Appellant Steven and his father, Bert Slotkin, since deceased, commenced the state court action against Beth-El Hospital. Citizens had $200,000 of primary liability insurance coverage but was undergoing liquidation and rehabilitation by the State of New York. Ten companies, here called the reinsurers,[3] reinsured $150,000 of this coverage. Subscribing underwriters at Lloyd's of London underwrote $1 million worth of excess insurance.

On February 22, 1971, at the jury selection, Christopher McGrath, the attorney for Citizens who was representing the defendant Hospital, told Max Toberoff, plaintiffs' attorney, that the Hospital had only $200,000 worth of insurance coverage. McGrath also stated that he had not told the Hospital's own counsel that the case was on trial, and he refused Tob-

---

3 Plaintiffs originally filed their complaint against ten reinsurers. They were: Allstate Insurance Co., American Motorists Insurance Co., American Mutual Insurance Co. of Boston, Employers Mutual Liability Insurance Co. of Wisconsin, Guaranty Reinsurance Co., Urbaine Fire Insurance Co., Grange League Insurance Co., National Casualty Co., Hardware Mutual Insurance Co., and Arkwright-Boston Manufacturers Mutual Insurance Co. Two of the reinsurers, Employers Mutual Liability Insurance Co. of Wisconsin and Grange League Insurance Co., were dismissed in 1977 by stipulation when it was shown that they had no conceivable connection to this matter. Another of the reinsurers, American Motorists Insurance Co., was a named defendant but was apparently never served; and it never appeared in the case (although Judge Pollack included it in his dismissal of all reinsurers). Hereafter, when we refer to "the reinsurers," we refer only to the seven active participants, *i.e.*, all the above named reinsurers *except* American Motorists Insurance Co., Employers Mutual Insurance Co. of Wisconsin, and Grange League Insurance Co.

eroff's request that he notify the Hospital's attorney. Toberoff, concerned about the collectibility of plaintiffs' likely judgment, then notified the Hospital administrator by telephone, letter, and telegram that the case was on trial and that the Hospital faced possible exposure to liability for a verdict in excess of $1 million. In response to the Administrator's telephone call, appellee George Berkowitz, an attorney and trustee of the Hospital, appeared at the courthouse on behalf of the Hospital. Berkowitz told Toberoff at that time that the insurance coverage was $200,000. According to Berkowitz's testimony in his deposition taken shortly before the trial below, he had learned about the policy limit from Christopher McGrath, John McGrath, also trial counsel for Citizens, and Paul Ratner, assistant vice-president and claims manager of Citizens.

On February 25, 1971, New York State Supreme Court Justice Oliver D. Williams, the trial judge, held a conference for the parties. According to Toberoff's testimony in the court below, both Berkowitz and Christopher McGrath affirmed to the judge that the total insurance coverage was $200,000, although as we have noted, Berkowitz stated that the McGraths and Ratner were the source of his information.[4] Toberoff stated that both he and Justice Wil-

---

4 Although Berkowitz insisted that the McGraths and Ratner told him about the $200,000 "policy limit," Berkowitz has not disputed Toberoff's statement that at this preliminary conference Berkowitz represented the coverage to be only $200,000 and that to the best of his knowledge there were no other policies. In fact, he has admitted that he did make such a representation to Justice Williams, although it is unclear from his deposition and his cross-complaint whether he made the statement at the preliminary conference or the final settlement negotiations. We note that in a colloquy that took place in Justice Williams'

liams found it difficult to believe that the Hospital's coverage was so low. Despite the very low "policy limit" and the plaintiffs' willingness to settle within the limit, the parties reached no agreement; and the case went to trial.

The state court trial proceeded to plaintiffs' advantage. Dr. Gerald Bernstein, an internist and assistant professor at Albert Einstein College of Medicine and acknowledged specialist in diabetes, testified that Mrs. Slotkin's doctor had ordered fractional urine specimens to be examined for sugar and acetone q.i.d. (four times a day); his orders hence required a test before each meal and at bedtime. Based upon the results of these tests, insulin should have been administered as necessary to avoid acetonuria.[5] Dr.

---

chambers at the March 4 conference Christopher McGrath stated that Berkowitz had told him that the Hospital had no coverage other than Citizens Casualty. We also note that Ratner also stated on deposition that he had asked Berkowitz whether there was any excess insurance above the $50,000 Citizens coverage (presumably a reference to the amount for which Citizens would ultimately be responsible) and that Berkowitz had said no. *But see* note 20 *infra*.

5 The doctor explained, as is well known, that because diabetics lack the insulin necessary to break down the sugar in their bodies, their blood sugar (glucose) rises. As a result, there is an excessive loss of water as the body attempts to expel the extra sugar that the kidneys cannot absorb. Additionally, because sugar is not reaching the cells, other things, such as fats, begin to act as substitutes for the sugar. The liver cannot accommodate the extra fats; and they turn into ketone acids, called acetones. When acetone is produced it will appear in the urine; this condition is termed acetonuria. If acetonuria is allowed to continue unchecked the chemistry of the body becomes acidic, a condition known as acidosis. This acidosis is sometimes called ketoacidosis because it consists of acids which are ketone bodies, products of fatty-acid catabolism. The result can be fatal and, in a pregnant woman, fatal or permanently damaging to the fetus. *See* Churchill, Berendes & Nemore, *Neuropsychological Deficits in Children of Diabetic Mothers*, 105 Am. J. Obst. & Gyn. 257 (Sept.-Dec. 1969). Thus, by measuring the amounts of sugar and acetone in the urine, a doctor can determine whether a patient requires insulin at that time.

Nicholas Olninc, a neurosurgeon who participated in a National Institutes of Health study introduced at the trial, corroborated Dr. Bernstein's testimony. The health study demonstrated the relationship between acetonuria in diabetic mothers and neuropsychological defects in their children. *See* note 5 *supra*. The evidence showed that on the morning of November 14, 1963, two days before Steven's birth, Mrs. Slotkin had acetonuria. This condition was short-lived; she was given regular insulin and responded very readily. By that afternoon the condition had cleared up; her 6:00 p.m. test was also negative. However, she was not given the remaining q.i.d. test before bedtime on the 14th. The following morning she did not feel well; her fractional urine test showed high levels of sugar and acetone, indicating the condition of acetonuria of so much concern. Her own physician administered insulin and made the following note in the hospital record: "Acetonuria noted this a.m. Probably due to the fact that patient has not received any insulin for almost 18 hours." Mrs. Slotkin responded slowly to the insulin, indicating that the acetonuria was quite severe and that she was in a state of acidosis. These episodes were the only acetonuria she had had during her pregnancy.

Steven was born on November 16 with symptoms of brain damage; when he was eleven months old and still not sitting up, his parents took him to Dr. Leon Greenspan, director of the Children's Division at the Institute of Rehabilitation Medicine, also known as the Rusk Institute. Dr. Greenspan diagnosed congenital brain damage; at trial he corroborated the testimony of Drs. Bernstein and Olninc that the failure to check Mrs. Slotkin's urine

before bedtime on November 14 and to administer the needed insulin had resulted in maternal acidosis which in turn had caused Steven's brain damage.

C. *The Settlement*

On March 1, 1971, just shortly before the close of plaintiffs' case in the state court and just prior to the time that plaintiffs settled on the basis of the representations of insurance coverage of $200,000, the expert on diabetes for the defense, Dr. Harold Zarowitz, sent appellee Christopher McGrath a letter summarizing their telephone conversation of February 27, 1971. This letter substantiated the negligence of the Hospital and corroborated the opinions of plaintiffs' doctors.[6] The parties held a settlement conference on March 4, 1971, before Justice Williams. At that conference Christopher McGrath again stated on the record that the total insurance coverage, including reinsurance, was $200,000 and that he knew that the Hospital did not have additional insurance with other companies.[7]

---

6 The letter reads in part:

> In conclusion, it seems apparent that this mother developed moderately severe ketoacidosis somewhere between the evening of November 14 and the morning of November 15. This was due to the fact that an appropriate urine analysis was not done at 10 P.M. on the evening of November 14 or thereafter, when acetone in the urine would have been detected. Had this been done, the administration of insulin as ordered by the physicians could have averted the acidotic state on the morning of the 15th. This significant ketoacidosis, in my opinion, can be an adequate cause of brain injury in the premature newborn.

7 MR. [Christopher] McGRATH: The total coverage is $200,000, including reinsurance.

MR. TOBEROFF: So far as you are concerned.

MR. McGRATH: Correct.

(footnote continued)

The parties drafted a stipulation of settlement that was read into the record; the settlement provided in pertinent part:

> It is further stipulated and agreed that the settlement of $185,000 is hereby approved by the trial judge and that he is to make the allocation of the said sum of $185,000 after all the facts and affidavits are submitted to him by trial counsel as to the allocation of the $185,000 between the plaintiffs Slotkin as to the loss of services and medical expenses and the balance paid to the plaintiff.
>
> It is further stipulated that the attorney for the defendant represents that the total insurance coverage of the defendant is the sum of $200,000, under a policy with Citizens Casualty, and to the best of his knowledge there are no other policies covering this event.
>
> The settlement in the sum of $185,000 is to be paid without interest, costs or disbursements.
>
> MR. TOBEROFF: So stipulated.
>
> MR. [Christopher] MCGRATH: So stipulated.
>
> MR. BERKOWITZ: So stipulated.

MR. TOBEROFF: You have no knowledge as to whether the hospital has additional coverage with other companies? You have no knowledge of that?

MR. McGRATH: I do have knowledge of that. We were the only company on the line at that time.

Because Mr. McGrath indicated that he knew that there was *no* other coverage, we construe his statement as being a denial of excess insurance also.

D. *Uncovering the Misrepresentation.*

Appellees Christopher McGrath and Berkowitz stipulated that to the best of their knowledge there was only $200,000 worth of coverage. The former, however, had complete access to documents that demonstrated otherwise. In the files of Citizens, there were letters from Robert Gilroy, an attorney with the firm of Mendes & Mount who represented the excess insurer, specifically inquiring about the Slotkin case.[8] The file with the Gilroy letters, which

---

8. One example of the Gilroy letters is as follows:

MENDES & MOUNT
27 William Street
New York, N.Y. 10005

March 31, 1967

Citizens Casualty Company of New York
33 Maiden Lane
New York, N.Y. 10038
[Attention] Mr. David Quigley, Examiner

. . . .

Your Ref: 7-8-44085
Claimant: Steven John Slotkin
D/A: November 11, 1963
Our File: 210,609

. . . .

Dear Mr. Quigley:

We are the attorneys representing the interest of the excess insurers for Beth El-Brookdale Hospital Center. We have received various letters sent by you to the assured stating that the litigation involves an amount in excess of your policy limits.

We would like to have the opportunity in approximately two months time to review your file and discuss these claims with you. We will accordingly be telephoning you in several weeks to arrange a mutually convenient time for such a review and discussion.

Very truly yours,

MENDES & MOUNT

By:_____
ROBERT GILROY

clearly indicated that there was excess coverage, was in the possession of the McGraths' firm during the state court trial. Berkowitz, who was a trustee of the Hospital and vice-chairman of the Legal Committee, did not speak with anyone in the Hospital administration nor check any of the Hospital records to determine whether they showed any excess insurance coverage; instead, he stated, he had relied solely upon the statements of Christopher and John McGrath, although Christopher McGrath, of course, maintains that Berkowitz told *him* what the coverage was. *See* note 4 *supra*. Ratner, who took over the settlement negotiations on March 4, contends that the McGraths and Berkowitz had told him that the coverage was only $200,000. But two of the Gilroy letters were specifically directed to Ratner's attention. Indeed, Ratner had briefly spoken with Gilroy regarding the Slotkin case before the trial and saw the letters from Gilroy shortly before the trial.[9]

A week to ten days after the parties entered into the stipulation on the record, Ratner advised Christopher McGrath, and Christopher McGrath in

---

9 Ratner was apparently in Florida during the trial below, and his deposition testimony taken in preparation for the trial was admitted into evidence as requested by plaintiffs' counsel. In a May 17, 1972, deposition Ratner stated that at the end of 1968 or sometime in 1969 he became aware that the Hospital had excess insurance when he "read a file for the first time and saw one or two letters from Mendes & Mount mentioning excess insurance." But, he stated, between the time that he read the file and the time of the state trial, he had "forgotten" that there was excess insurance. In an April 9, 1975, deposition Ratner stated that when he looked at the file shortly before trial, he noticed the letters from Mendes & Mount but that because the firm "was the reinsurer and not the excess carrier" in "hundreds" of other cases, he "associated [the firm] with their role as a reinsurer." But because the letters themselves explicitly disclose the excess insurance, Ratner cannot excuse his representations on the basis of a failure of memory or mistake.

turn advised Justice Williams and Toberoff, that there was $1 million in excess coverage and that the representations as to insurance coverage had been erroneous.[10] At this point Justice Williams had not yet signed an order under N.Y. Civ. Prac. Law § 1207 and Rule 1208 (McKinney)[11] allocating the sums paid in settlement. Justice Williams held a conference on March 31, 1971. The judge attempted to have the excess insurer participate in new settlement discussions, but it refused to do so because it claimed

---

10 According to Ratner's testimony in deposition, two or three days after the trial ended, Robert Gilroy of Mendes & Mount as attorney for the excess insurer saw a story in the newspaper about the settlement and called Ratner to congratulate him. Ratner testified that he did not understand the purpose of the call, so he called Gilroy three or four days later to ask why Gilroy had called. Gilroy then stated that "[w]e had an excess on it," and only then according to Ratner did he remember that there was additional coverage.

11 § 1207. Settlement of action or claim by infant or judicially declared incompetent, by whom motion made; special proceeding; notice; order of settlement

Upon motion of a guardian of the property or guardian ad litem of an infant or, if there is no such guardian, then of a parent having legal custody of an infant, or if there is no such parent, by another person having legal custody, or if the infant is married, by an adult spouse residing with the infant, or of the committee of the property of a person judicially declared to be incompetent, the court may order settlement of any action commenced by or on behalf of the infant or incompetent. If no action has been commenced, a special proceeding may be commenced upon petition of such a representative for settlement of any claim by the infant or incompetent in any court where an action for the amount of the proposed settlement could have been commenced. If no motion term is being held and there is no justice of the supreme court available in a county where the action or an action on the claim is triable, such a motion may be made, or special proceeding may be commenced, in a county court and the county judge shall act with the same power as a justice of the supreme court even though the amount of the settlement may exceed the jurisdictional limits of the county court. Notice of the motion or petition shall be given as directed by the court. An order on such a motion shall have the effect of a judgment. Such order, or the judgment in a special proceeding, shall be entered without

that Citizens had not notified it that the case was going to trial (although it did know that an action was pending). Attorneys for the excess insurer did state that it would participate if there were a retrial.

---

costs and shall approve the fee for the infant's or incompetent's attorney, if any.

Rule 1208. Settlement procedure; papers; representation

(a) Affidavit of infant's or incompetent's representative. An affidavit of the infant's or incompetent's representative shall be included in the supporting papers and shall state:

1. his name, residence and relationship to the infant or incompetent;

2. the name, age and residence of the infant or incompetent;

3. the circumstances giving rise to the action or claim;

4. the nature and extent of the damages sustained by the infant or incompetent, and if the action or claim is for damages for personal injuries to the infant or incompetent, the name of each physician who attended or treated the infant or incompetent or who was consulted, the medical expenses, the period of disability, the amount of wages lost and the present physical condition of the infant or incompetent;

5. the terms and proposed distribution of the settlement and his approval of both;

6. the facts surrounding any other motion or petition for settlement of the same claim, of an action to recover on the same claim or of the same action;

7. Whether reimbursement for medical or other expenses has been received from any source; and

8. whether the infant's or incompetent's representative or any member of the infant's or incompetent's family has made a claim for damages alleged to have been suffered as a result of the same occurrence giving rise to the infant's or incompetent's claim and, if so, the amount paid or to be paid in settlement of such claim or if such claim has not been settled the reasons therefor.

(b) Affidavit of attorney. If the infant or incompetent or his representative is represented by an attorney, an affidavit of the attorney shall be included in the supporting papers and shall state:

1. his reasons for recommending the settlement;

2. that directly or indirectly he has neither become concerned in the settlement at the instance of a party or per-

Toberoff insisted that it was impossible to retry the case. Mrs. Slotkin, who had testified at trial and whose testimony was important because it contradicted the hospital record in part, had still not recovered completely from a heart attack. Her physician, who examined her shortly after the trial, stated that she should not be asked to testify again. Additionally, all of the plaintiffs' expert witnesses—Dr. Bernstein, Dr. Greenspan, Dr. Olninc—indicated that they would not testify again. Toberoff contacted a number of other doctors, but they also refused to testify. Moreover, the Slotkins did not have the funds for a new trial. The cost of the plaintiffs' case had been $6,800, and they had borrowed $3,000 to make partial payment.

Toberoff also rejected the offer to forfeit the plaintiffs' jury rights and continue the trial before the judge on the original record. He similarly refused the offer of a new jury trial that would rely on the record from the original trial because he believed

---

son opposing, or with interests adverse to, the infant or incompetent nor received nor will receive any compensation from such party, and whether or not he has represented or now represents any other person asserting a claim arising from the same occurrence; and

3. the services rendered by him.

(c) Medical or hospital report. If the action or claim is for damages for personal injuries to the infant or incompetent, one or more medical or hospital reports, which need not be verified, shall be included in the supporting papers.

(d) Appearance before court. On the hearing, the moving party or petitioner, the infant or incompetent, and his attorney shall attend before the court unless attendance is excused for good cause.

(e) Representation. No attorney having or representing any interest conflicting with that of an infant or incompetent may represent the infant or incompetent.

(f) Preparation of papers by attorney for adverse party. If the infant or incompetent is not represented by an attorney the papers may be prepared by the attorney for an adverse party or person and shall state that fact.

that having his clients' case put to the jury in the form of a record when the defendants' case would be put in on live testimony would disadvantage plaintiffs' case. Therefore, at the insistence of Toberoff and the plaintiffs, Justice Williams on June 4, 1971, signed the "infant's compromise order," *see* note 11 *supra,* approving the settlement. Toberoff's intention to sue all parties involved for fraud was well-known at the time.

E. *The Federal Court Suit*

Plaintiffs initiated the instant diversity action for fraud, but prior to trial they voluntarily discontinued the case against the Hospital; its administrator and deputy administrator; the excess insurer; its attorney, Robert Gilroy, and his law firm, Mendes & Mount. The case went to trial against the other defendants, who were Citizens, the primary insurer; the reinsurers; Ratner; Berkowitz; and the McGraths. At the close of plaintiffs' case Judge Pollack dismissed the complaint against the reinsurers. The jury found both underlying malpractice on the one hand[12] and fraud on the other; it rendered a verdict in the total sum of $680,000, allocating it in accordance with Judge Pollack's "supplemental instructions"[13] as follows: Citizens, $500,000; Berkowitz $100,000; Ratner, $60,000; Christopher McGrath, $20,000; and John McGrath, nothing.

---

12 There is substantial evidence of the medical malpractice. In addition to the testimony of plaintiffs' experts, Drs. Bernstein, Olninc, and Greenspan, in text *supra* at note 5, there is the letter from defendants' expert, Dr. Zarowitz, note 6 *supra*. *See also* note 5 *supra*.

13 In fact there were no real supplementary instructions but rather colloquy and direction. The entire transcript of what took place in the jury's presence is as follows:

THE COURT: Madam Forelady, has the jury agreed upon a verdict?

(footnote continued)

Subsequent to the verdict Judge Pollack ruled on a reserved motion and dismissed the complaint

---

THE FORELADY: Yes.

THE COURT: This says that you have reached a verdict.

You may make inquiries, Mr. Clerk.

The Clerk will ask you about each name and then you will advise what your verdict is.

THE CLERK: What is your verdict as to the defendant Citizens Casualty Company of New York?

THE FORELADY: We have decided against.

THE COURT: Is that your whole verdict?

THE FORELADY: Yes.

THE COURT: Is there any amount of verdict against them?

You decided against them, did you say?

THE FORELADY: Yes.

THE COURT: In what amount, if any?

THE FORELADY: We have an amount for all.

THE COURT: What is the amount that the jury has found? In other words, you have found the same amount against all defendants?

THE FORELADY: A total of $680,000 total against all of them.

THE COURT: Your verdict against the Citizens Casualty is what?

THE FORELADY: We didn't break it down, your Honor.

THE COURT: Has the jury found that each of the defendants is liable for the $680,000? Is that what you are saying?

THE FORELADY: Yes, your Honor.

THE COURT: In other words, as to the defendant Citizens Casualty, Paul Ratner, Chris McGrath, John McGrath and George Berkowitz, your verdict is $680,000?

THE FORELADY: Yes, your Honor.

THE COURT: Poll the jury.

(Jury roll called—all present.)

THE CLERK: You say that you find in favor of the plaintiff Steven John Slotkin as against the defendant Citizens Casualty Company of New York, Paul Ratner, Christopher McGrath, John McGrath and George Berkowitz in the sum of $680,000.

JUROR NUMBER TWO: Combined.

THE COURT: When you say total combined, let me understand that. You have reached one verdict?

JUROR NUMBER FOUR: One verdict, one total against all combined. I hope it wasn't misunderstood that it was against each one.

THE FORELADY: A total.

THE COURT: The way the verdict stands now, it is a verdict against each one for $680,000.

(footnote continued)

against John McGrath.[14] He also granted to all appellees judgment notwithstanding the verdict, relying

---

THE FORELADY: No, all told.

THE COURT: The only collectibility will be a total of $680,000.

Is that what you are saying?

THE FORELADY: Yes.

THE COURT: That means that each one is held individually—

JUROR NUMBER TWO: A fraction of.

JUROR NUMBER FOUR: A portion of, pro rated.

THE COURT: If it is a pro rated verdict, that is one thing. On the other hand, if you intend a proportionate verdict only, that is, for each one in a particular amount that's a different thing. So, I have to send you back for you to decide what verdict you wish to render. The defendants are sued individually, and although you say there is only one total recovery, if you have all indicated the amount among them, that's one kind of a verdict.

If you have not allocated the verdict among them, any one is responsible for the whole $680,000.

So, you better go out and decide what it is that you are trying to call to our attention.

Will the jurors go back for a moment while I talk to counsel, to be sure I have a correct understanding of what it is Juror Number Four, I think it was, tried to convey to me.

. . . .

THE COURT: Bring in the jury.

(Jury present.)

THE CLERK: Madam Forelady, has the jury agreed upon a verdict?

THE FORELADY: Yes, we have.

THE COURT: Read the verdict.

THE CLERK: (Reading) We have a verdict in favor of the plaintiff for $680,000 to be apportioned in this manner: Citizens Casualty $500,000, Mr. Berkowitz $100,000, Mr. Ratner $60,000, Chris McGrath $20,000, John McGrath nothing.

Signed Anna D. O'Shea, Forelady.

THE COURT: Poll the jury.

(Each juror, upon being asked by the Clerk "Is that your verdict?", answered in the affirmative.)

THE COURT: All right, ladies and gentlemen, that completes your service in this case. Thank you very much for your attention and the time that you spent. You are now excused.

(Jury discharged.)

14 The ground for dismissal is not readily discernible although it appears to be that the jury did not find John McGrath liable.

(footnote continued)

on one proposition and one fact. The proposition was that, because the case concerned a minor, "the settlement stipulation was unenforceable unless it was followed by a judicial order finalizing the arrangement, providing for the distribution of the settlement fund and terminating suit." *Slotkin v. Citizens Casualty Co. of New York*, 447 F. Supp. 253, 255-56 (S.D.N.Y. 1978). The fact upon which Judge Pollack relied was that plaintiffs had learned of the excess insurance before that final order was made and judgment entered so that their "insistence on proceeding with and thereby obtaining the execution of the stipulation of settlement . . . bars this action." *Id.* at 256. Judge Pollack reasoned that "[i]n the instant case, plaintiffs had not significantly changed position to their prejudice before learning the truth." *Id.* at 257. He first noted that there was "no impairment of the facts giving rise to claims of malpractice by

---

After the jury rendered its allocated verdict, counsel for the McGraths began to make a motion as to "George McGrath." The court interrupted, saying that there was no verdict against John McGrath. Counsel quickly agreed, stating that zero damages was really a verdict in John McGrath's favor. The court did not disagree and immediately dismissed the complaint as to him.

Plaintiffs' attorney excepted to the dismissal on the ground that the jury's verdict of liability, before it apportioned damages, was a verdict against all the defendants, including John McGrath. The court responded that "there was no competent evidence within the burden of proof obligatory in a fraud case" of any intent on his part to deceive nor gross negligence or pretense of knowledge. Plaintiffs' attorney began to catalogue the evidence against John McGrath to show that it was sufficient "to raise a triable issue of fact." The court, however, countered that "[a]ny verdict against John McGrath would have been clearly against the weight of the credible evidence and would have been clearly set aside on that ground as well as the ground already mentioned." By this last ground the judge further disclosed his belief that the jury's failure to allocate any damages to John McGrath was in effect a finding of no liability; we note that he stated that a verdict against John McGrath "*would have been* set aside."

the hospital"; he then noted that because the plaintiffs had to prove the underlying malpractice even in the fraud action,[15] retrying the malpractice case would have been no more burdensome than pursuing the action for fraud. *Id.* He held that by obtaining a verdict in the present litigation "plaintiffs have proved that such a retrial was indeed practicable." *Id.*

II. Discussion

A. *Judgment Notwithstanding the Verdict*

Initially, we note that Judge Pollack had the power to rule as he did on the waiver point, even though Judge Motley (and he) had held otherwise previously. It is well established that "the law of the case" does not constitute a limitation on the court's power but merely expresses the general practice of refusing to reopen what has been decided. *Dictograph Products Co. v. Sonotone Corp.*, 230 F.2d 131, 134-36 (2d Cir.), *petition for cert. dismissed per stipulation*, 352 U.S. 883 (1956). *See also Messenger v. Anderson*, 225 U.S. 436, 444 (1912); *LeRoy v. Sabena Belgian World Airlines*, 344 F.2d 266, 274 (2d Cir.), *cert. denied*, 382 U.S. 878 (1965).

As a matter of law, however, we agree with Judge Motley's ruling. As she said, it was the settlement stipulation entered into *before* the plaintiffs knew of the excess coverage that was the contract induced by appellees' misrepresentations; and as a result of the

---

15 Appellants do not contest Judge Pollack's ruling that they had to prove in the federal trial that they had a valid malpractice claim in the state court, a ruling based on *Urtz v. New York Central & Hudson River R.R. Co.*, 202 N.Y. 170, 175-76, 95 N.E. 711, 712-13 (1911).

stipulation plaintiffs terminated the state court jury trial without a verdict. 357 F. Supp. at 707. The law of New York is clear that one who has been induced by fraudulent misrepresentation to settle a claim may recover damages without rescinding the settlement. *Strong v. Strong*, 102 N.Y. 69, 73, 5 N.E. 799, 800 (1886); *Byrnes v. National Union Insurance Co.*, 34 A.D.2d 872, 310 N.Y.S.2d 781 (1970); *Inman v. Merchants Mutual Casualty Co.*, 274 A.D. 320, 323-24, 83 N.Y.S.2d 801, 804 (1948).[16]

Even if the underlying premises of this New York rule allowing rescission on the one hand or ratification and suit for damages on the other were unsound, we would of course nevertheless be bound by that rule. The premises for the rule, however, are quite sound. If all that will result from a misrepresentation is a new trial, then the party making it has everything to gain and nothing to lose. The plaintiffs would be placed at a disadvantage by a new trial; the defendants would not. If anything, defendants would benefit by having a preview of plaintiffs' case. As McCormick notes in the case of willful fraud:

> [I]f the defendant by willful falsehood has cozened the plaintiff into risking his property upon a bargain, which, upon the information given by the defendant, would have been profitable, a remedy which merely seeks to place the plaintiff

16 *See also Automobile Underwriters v. Rich*, 222 Ind. 384, 53 N.E.2d 775 (1944); *Southern Ry. Co. v. Jaynes*, 86 Ind. App. 451, 140 N.E. 556, 558 (1923); *Ware v. State Farm Mut. Auto. Ins. Co.*, 181 Kan. 291, 311 P.2d 316, 320-21 (1957); *Minazek v. Libera*, 83 Minn. 288, 86 N.W. 100, 101-02 (1901); *Brown v. Ocean Accident & Guar. Corp.*, 153 Wis. 196, 140 N.W. 1112, 1114-15 (1913).

> back in the position he was in before seems hardly adequate. The plaintiff might well be given the value of the expected bargain. A willful fraud should cost as much as a broken promise. If the cheat can anticipate that the worst that can happen is that he shall be called upon to pay back his profit upon the trade, he may be encouraged to defraud.[17]

C. McCormick, Handbook on the Law of Damages § 121, at 453 (1935). Thus the New York rule serves to deter fraud. Moreover, the rule does not present a problem of double recovery. In this case, for example, Judge Pollack appropriately instructed the jury that in fixing damages it should deduct from the "fair settlement value" the $185,000 received under the settlement. *See* note 2 *supra*.

Judge Pollack considered that the settlement was "inchoate" until the judicial order finalizing the arrangement was made. He relied heavily on this characterization in determining that defendants' misrepresentations had not prejudiced plaintiffs. But even if the March 4, 1971, stipulation of settlement was technically "inchoate,"[18] it was treated as final at the time; and plaintiffs reasonably relied upon defendants' representations in agreeing to the settlement

---

17 The fraud here was a statement that the defendants knew that there was no additional insurance when, in fact, they did not *know* that.

18 The court below used both the words "inchoate" and "unenforceable." And, technically, before judicial approval the settlement was both. But the characterizations are relevant only from the standpoint of determining the defendants' obligations under the applicable state law. They do not go to the question of plaintiffs' detrimental reliance which occurred on settlement and dismissal of the jury and not on the court's approval of the settlement.

and allowing the judge to dismiss the jury. Thus although it is true that plaintiffs could have avoided going through with the settlement, this does not diminish the prejudice that they had already suffered by irrevocably changing their position.

In holding that plaintiffs had waived their right to sue by not rescinding the settlement, Judge Pollack relied upon a series of commercial cases which he cited for the proposition that "[i]f a victim of misrepresentation learns the truth when performance of a contract has just begun, and he could rescind without significant prejudice, . . . he waives the fraud if he proceeds to execute the agreement." 447 F. Supp. at 256, *citing, e.g., A.G. Concrete Breakers, Inc. v. State*, 9 A.D.2d 995, 996, 194 N.Y.S.2d 743, 745 (1959) (alternative ground); *Kelly v. Otis Elevator Co.*, 283 A.D. 363, 368, 128 N.Y.S.2d 39, 43 (1954) (dictum), *aff'd mem.*, 308 N.Y. 805, 125 N.E.2d 864 (1955). This rule prevents a plaintiff from recovering damages for "self inflicted" injury. *See, e.g., Thompson v. Libby*, 36 Minn. 287, 31 N.W. 52, 53 (1886). But these cases are distinguishable because they all involve an exchange of money or value for goods or services after the defrauded party has learned of the fraud and when he has not incurred any damages at the time that he has the opportunity to rescind.

Involved here, however, is the release or settlement of an underlying personal injury claim where, in contrast to the commercial cases, the plaintiffs had already been injured by the dismissal of the jury before they discovered the fraud. Plaintiffs here never had the opportunity to avoid any injury. Plaintiffs were already injured, and their only choices were to accept the settlement and sue for fraud or to

retry the malpractice case with all that retrial involved in terms of obtaining witnesses and the like. Given these choices, their decision to proceed by way of the fraud action was understandable, as we discuss below.

The true measure of damages was as Judge Pollack charged initially: the difference in settlement value before and after discovery of the fraud, note 2 *supra*. We note that there is no problem here of plaintiffs' failure to mitigate damages by this suit rather than electing to retry the malpractice action. It is true that on retrial the exposure of appellees would have been less because the excess insurer would have been in the case. Nevertheless, plaintiffs were not obliged to incur the risks that retrial would have presented. At retrial, so far as then appeared, plaintiffs would stand a chance of receiving a verdict smaller than the original settlement amount or possibly losing everything in a verdict for the defendants. This risk was additional prejudice to them if they proceeded by retrial because they had already eliminated this risk from the first trial by settling. Having passed the point in the first trial where they could have received nothing or less than $185,000, they should not be required to face this risk again in a second malpractice trial. The law of damages is clear:

> If the effort, risk, sacrifice, or expense which the person wronged must incur in order to avoid or minimize a loss or injury is such that under all the circumstances a reasonable man might well decline to incur it, a failure to do so imposes no disability against recovering full damages.

C. McCormick, *supra*, § 35.

Of course by hindsight it may appear that the risk of a defendant's verdict was minimal, but that is by hindsight only. At the time that plaintiffs had to make their election there was a definite possibility that no live medical evidence could be had for a retrial.

We stress again that it was appellees who committed the fraud, that plaintiffs did significantly change position by allowing the judge to dismiss the jury before learning the truth, and that obtaining a verdict in the present litigation under more favorable circumstances does not at all show that a retrial in the state court would not have resulted in still further injury to plaintiffs.[19] Thus Judge Pollack was in error in granting judgment notwithstanding the verdict on the ground that plaintiffs had not significantly changed their position before learning the truth.

---

19 We note that according to the expert testimony of former Justice Bernard Meyer (now Judge of the Court of Appeals) and Justice Frank B. McCullough, both retired from the New York Supreme Court, under New York law doctors could not be forced to provide live opinion testimony in state court. Thus in a retrial of the malpractice action in the state court, plaintiffs would have been unable to obtain the oral testimony of their key witnesses after they refused to testify voluntarily. This is true even though under federal law one can compel expert testimony by subpoena. Indeed, although Drs. Bernstein and Greenspan agreed to testify voluntarily in the federal fraud action, they did so only after being told that if they refused they would be subpoenaed. (Dr. Olnine was unavailable by reason of a failure of memory with age, and his testimony from the state court trial was read into the federal record.) Thus one cannot equate success in the 1977 federal fraud action with a lack of detriment and damage in the 1971 state malpractice action as Judge Pollack did. *Slotkin v. Citizens Casualty Co. of New York*, 447 F. Supp. 253, 257 (S.D.N.Y. 1978).

Moreover, even without regard to the difference between the state and federal procedure, Judge Pollack's position proves too much. By proceeding with the fraud action, plaintiffs did not eliminate the prejudice that they had suffered. When the defendants' conduct put plaintiffs in a disadvantageous position, plain-

B. *The Liability of the Parties*

Because we believe that the jury could properly have found, as it did under appropriate instructions, *infra* note 19, that fraudulent misrepresentations made to plaintiffs amounted to legal fraud, and that they did not waive their right to sue for the injury that they suffered as a result of those representations, we address the remaining principal question on appeal of who was responsible and who is therefore liable.

1. Christopher McGrath

We believe that the jury could properly find that Christopher McGrath's conduct rendered him liable under New York law as charged. McGrath was in charge of the settlement negotiations until Ratner took over; all the while McGrath's position of authority heightened the impact of his representations as to the insurance coverage. McGrath stipulated that "to the best of his knowledge" there was only $200,000 worth of coverage in spite of the information in the documents in his possession. *See* note 8 *supra*. McGrath's insistence that the policy limit was $200,000, *see* note 7 *supra*, renders him liable under the New York definition of scienter as "a reckless indifference to error," "a pretense of exact

---

tiffs were injured; they did not stop being injured just because they were able to overcome the injury. Under Judge Pollack's view, the victim of fraud would never be able to recover his damages by electing to affirm the settlement and sue for damages in deceit: no matter what the prejudice, his success in proving the underlying cause of action would demonstrate the absence of prejudice in proceeding by retrial. Because New York law allows the fraud victim to proceed by affirmance and an action for deceit, we cannot subscribe to Judge Pollack's view of the relationship between the two causes of action.

knowledge," or "an assertion of a false material fact 'susceptible of accurate knowledge' but stated to be true on the personal knowledge of the representer." *See Burgundy Basin Inn v. Watkins Glen Grand Prix,* 51 A.D.2d 140, 379 N.Y.S.2d 873, 879 (1976), and cases cited. This, of course, attunes with the classic formulation of Judge Cardozo in the touchstone case of *Ultramares Corp. v. Touche, Niven & Co.,* 255 N.Y. 170, 174 N.E. 441, 449-50 (1931).[20]

2. Paul Ratner

Ratner took over the settlement negotiations on March 4; and again, his position of authority in and of itself made his misstatements more egregious. Ratner contends that the McGraths and Berkowitz[21] told him that the coverage was only $200,000; but again, the documents are evidence against him. *See* note 9

---

20 The trial court's instructions quite accurately presented to the jury these alternative bases for a finding of fraud. The court charged that the jury must find scienter and that

> a person makes a misrepresentation with scienter, meaning knowingly, if he knows that the representation is false, or he neither knows nor cares whether it is true or false, or if he has no genuine belief that it is true. If a speaker actually believes that what he says is true, then he does not act with scienter, even though that belief is negligent, in that a reasonable man would not believe it.
>
> There is one exception to what I have just told you. If you find that the defendant whom you are considering intended that it should be understood that what he said about the hospital's insurance was true to his personal knowledge and intended that the plaintiffs should act on the basis of what he said, then you should find that said defendant acted with scienter if he didn't know what he [said] was true. To this extent, a person who asserts a falsehood as true to his personal knowledge may be said to have acted with scienter, that is, knowingly, even though he believes what he says to be true.

21 We note that Ratner did not speak with Berkowitz until after the McGraths had informed Berkowitz about the policy limit.

supra. The letters then in his possession explicitly disclose the excess insurance; and there was ample evidence, to permit the jury to reject any defense of failure of memory or simple mistake on his part, note 10 *supra*, and, as in the case of Christopher McGrath, to find scienter under *Burgundy Basin* and *Ultramares, supra*.

3. George Berkowitz

The jury's finding as to Berkowitz is more troubling. Berkowitz did not speak with anyone in the Hospital administration nor check any of the Hospital records to determine the insurance coverage, instead relying solely upon the statements of Christopher and John McGrath. We could easily hold that Berkowitz was negligent, perhaps even grossly negligent, in so failing to check or in so relying; but there is, we think, insufficient evidence to permit a jury to find recklessness or a representation "stated to be true on the personal knowledge of the representer."

Indeed, we note that plaintiffs in fact did not premise their action against Berkowitz on the theory that he had intentionally or even recklessly misrepresented the amount of the insurance coverage. Both Charlotte Slotkin and Toberoff testified that they did not believe that Berkowitz had lied. Rather, Mrs. Slotkin stated that "he just didn't know any better about any of the insurance companies"; and Toberoff stated that "it was my impression that George Berkowitz may have been guilty of a fraudulent representation in that he was grossly careless." Furthermore, plaintiffs do not make a claim against Berkowitz for a representation of absolute knowledge.

Their reference to the record discloses, insofar as Berkowitz is concerned, only the testimony on deposition by Berkowitz that he told Toberoff after conversing with the McGraths that he "was informed that there was $200,000 insurance."

Finally, we note that Berkowitz not only had no motive to conceal the excess insurance; but rather, to protect the Hospital, he had every reason to seek to tap whatever insurance coverage there might have been. His unawareness of the excess insurance is evident in his statement to Justice Williams that because he believed that the Hospital itself would be liable above the $200,000 limit, he wanted the record to reflect bad faith on the part of the insurance carrier if it failed to settle the case within the $200,000 limit. The district court itself noted the "extraordinarily thin reed on which it is suggested that there may be a claim against" Berkowitz, and we hold that the court did not err in recognizing this lack of evidence in granting Berkowitz's motion for judgment notwithstanding the verdict.

4. Dismissal of John McGrath

The court should not, however, have dismissed the complaint as to John McGrath.[22] Although he may have been only minimally at fault, there was sufficient evidence for the case against him to go to the jury; and the jury found him liable (even though in subsequently apportioning the damages it allocated none to him). As to John McGrath the verdict was not against the weight of credible evidence. There was evidence that John McGrath gave the ap-

22 *See* note 14 *supra*.

pearance of personal knowledge when he specifically ratified his brother's misrepresentation: "What Chris told you is true . . . . All the coverage there is on the case is $200,000 . . . . That's it. How many times do you want to hear it?" Berkowitz stated that John McGrath was one of his sources of information about the insurance coverage. There was evidence that John McGrath participated in the drafting of the March 4 stipulation which contained explicit representations as to the coverage limit. Moreover, the letters from the excess insurer's counsel were in his firm's file. We note that on the basis of this evidence, Judge Pollack reversed his earlier ruling granting John McGrath's motion for dismissal. On the renewed motion at the close of all the evidence, Judge Pollack recognized that it would be best to get the jury's verdict on the fact questions. The evidence supports the verdict that the jury rendered, and it is in accordance with New York law under *Burgundy Basin* and *Ultramares, supra.*

Finally, even though the case was not tried on a partnership theory, as a matter of law John McGrath was liable for his partner's tort. N.Y. Partnership Law §§ 24, 26 (McKinney); *Caplan v. Caplan,* 268 N.Y. 445, 448, 198 N.E. 23, 24 (1935); *see also Pedersen v. Manitowoc Co.,* 25 N.Y.2d 412, 419, 255 N.E.2d 146, 150, 306 N.Y.S.2d 903, 909 (1969) (joint venture).

5. Dismissal of the Reinsurers

The reinsurers were closely involved in all the transactions leading up to the settlement. They had written notice of the state court trial, and they had an absolute right to all information concerning any

matter affecting their coverage. Moreover, their consent was needed for any settlement within the reinsured range, *i.e.*, over $50,000. There was abundant evidence, including Ratner's own testimony, that throughout the trial Ratner communicated with each of them either directly or through his subordinate. Ratner told Toberoff that he had to telephone the reinsurers as soon as the settlement talk crossed the $50,000 line. Indeed, Toberoff provided Ratner with a copy of the National Institutes of Health study better to enable Ratner to persuade the reinsurers to settle. Ratner testified that he contacted each of the reinsurers to obtain their final consent to the $185,000 settlement. And according to Toberoff's testimony in the court below, Berkowitz told him at the time of the settlement negotiations that Ratner was talking to the reinsurers; Christopher McGrath confirmed that Ratner told him that he, Ratner, had obtained the reinsurers' consent to the settlement.

For the reinsurers to be liable for misrepresentation, plaintiffs needed to prove that Ratner was acting as their agent or representative when he misrepresented the amount of coverage. A crucial point to remember is that although the reinsurers' consent was required for any settlement above $50,000, they did not have an employee present at the trial. Because a settlement stipulation was agreed upon, one can infer that the reinsurers' consent to the settlement was obtained through some intermediary, some agent. The reinsurers contend that Ratner's testimony was inadmissible against them to prove agency and thus that there was a complete absence of probative evidence of an agency relationship.

In dismissing the complaint against the reinsurers, Judge Pollack relied on the rule of law that he paraphrased as "[a]cts and declarations of a person assuming to be the representative of another are not competent to prove the agency." *Compare Restatement (Second) of Agency* § 285 (1958). That rule, however, does not deal with testimony by an agent. *See id.* comment a. As there stated, "[a] person can properly testify as to the facts which it is alleged constitute his authority, and his testimony can be introduced either by or against the alleged principal." *See* F. Mechem, *Outlines of the Law of Agency* § 95 (P. Mechem ed. 1952). *See also Steuerwald v. Jackson,* 123 A.D. 569, 108 N.Y.S. 41 (1908); *Boston Old Colony Insurance Co. v. Trivedi,* 93 Misc. 2d 566, 403 N.Y.S.2d 169 (1978). Thus Ratner's testimony was admissible on the issue of agency. The reinsurers themselves concede in their brief that "[t]he deposition testimony of Mr. Ratner . . . is not prohibited by the rule regarding the out of court acts and declarations of a purported agent." Rather, their argument is that Ratner's statements do not prove the existence of agency. We agree with plaintiffs that their burden of proof to avoid dismissal of the complaint was not to prove the agency but merely to adduce sufficient evidence to take the issue to the jury. The jury should have been allowed to resolve the fact questions, as is its province.

This is not to say that Ratner's misrepresentations as to excess coverage were within the scope of his agency. This too is a question of fact that the fact-finder must decide. The rule in this regard is that "[i]f the statement is one which, if true, the agent would be authorized or apparently authorized to make, the principal is subject to liability for it,

although deceitfully made." *Restatement (Second) of Agency, supra,* § 257, comment a.[23] We note, however, that the jury's verdict indicates a finding that Ratner's comments were made within the scope of his agency with Citizens. We believe that there is also sufficient evidence for a jury to conclude that if Ratner was acting as agent for the reinsurers, his comments were similarly within the scope of his agency. The evidence could support a finding that Ratner's agency relationship with Citizens and with the reinsurers was the same; if so we can see no difference in the fact of liability of the two as principals.

We note further on the issue of the sufficiency of the evidence that on the basis of Ratner's declarations, we must reject the reinsurers' contention that the *Restatement* rule prohibiting out of court declarations renders "inadmissible and substantively incompetent" on the issue of agency the testimony of Toberoff, Berkowitz, and Christopher McGrath. Section 285 provides that:

> Evidence of a statement by an agent concerning the existence of extent of his authority is not admissible against the principal to prove its existence or extent, unless it appears by other evidence that the making of such statement was within the authority of the agent or, as to persons dealing with the agent, within the apparent authority or other power of the agent.

---

23 *See also Johns Hopkins Univ. v. Hutton,* 422 F.2d 1124, 1130 (4th Cir. 1970), *cert. denied,* 416 U.S. 916 (1974); *Jerger v. Rubin,* 106 Ariz. 114, 471 P.2d 726, 731 (1970).

Thus if the jury finds that Ratner's declarations establish the agency and the scope of his authority as encompassing his statements, then it may properly consider the testimony of others as well. Thus on the basis of all of the testimony, there was sufficient evidence of an agency relationship to send the case against the reinsurers to the jury.

C. *Allocation of Damages*

Appellees argue that in any event a new trial is called for because of the jury's allocation of damages. The jury first brought in a verdict of $680,000 "total against all of them." *See* note 13 *supra*. In response to a question by the court, "Has the jury found that each of the defendants is liable for the $680,000?," the forelady said, "Yes, Your Honor." At this point, the court raised the spectre of multiple liability against the defendants in the amount of $680,000 each and sent the jury out to determine whether it wanted to allocate the verdict. *Id.* The jury returned the second time with the allocated verdict as noted above.

Judge Pollack's subsequent comments and actions amounted to an instruction to the jury to determine contribution rights under *Dole v. Dow Chemical Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), something that has no bearing upon the joint and several liability to the plaintiffs of the defendants found liable. *Kelly v. Long Island Lighting Co.*, 31 N.Y.2d 25, 286 N.E.2d 241, 334 N.Y.S.2d 851 (1972). In his written opinion, Judge Pollack correctly concluded that although the allocated verdict was in accordance with his instruction, it was erro-

neous as a matter of law because liability for the whole harm was joint and several. 447 F. Supp. at 257-58.[24]

Thus the crucial question is whether the subsequent submission to the jury can be treated as void, allowing plaintiffs to reinstate the $680,000 verdict. We find that under *Klepper v. Seymour House Corp.*, 246 N.Y. 85, 98-99, 158 N.E. 29, 34 (1927), the jury properly found a general verdict in accordance with the law; their subsequent action of allocation under direction of the court is surplusage which may be disregarded. *See also Dextone Co. v. Building Trades Council,* 60 F.2d 47, 49 (2d Cir. 1932) (where jury verdict, which attempted to apportion damages, had found both liability and amount of plaintiff's loss, form of verdict may be disregarded); *Gleich v. Volpe,* 32 N.Y.2d 517, 523-24, 300 N.E.2d 148, 151-52, 346 N.Y.S.2d 806, 811 (1953) (trial judge properly disregarded jury's attempt to apportion damages between defendants and entered judgment against both defendants for full amount awarded plaintiffs). We hold that the $680,000 verdict against Citizens, Ratner, and both McGraths, jointly and severally, may be reinstated.

Because we have also held that the court below should not have dismissed the complaint against the reinsurers, plaintiffs have an option: they may either reinstate the verdict and judgment of $680,000

---

24 The parties alluded at trial to a stipulation among the defendants to try the "cross claims" to the court in a nonjury trial if the jury found liability. Why this was abandoned in favor of a resubmission to the jury after the basic verdict—if that is what occurred—does not appear in the record on appeal, which does not contain the stipulation. How to proceed on the cross claims for contribution, indemnification, and the like is, of course, a matter for the district court on remand.

against Citizens and the three individuals, or they may retry the case ab initio against all appellees except George Berkowitz on both liability and damages. They may not do both. If plaintiffs elect reinstatement of the verdict already rendered, the case will be remanded for a separate trial before Judge Pollack on the cross claims for contribution and apportionment among the appellees (again except George Berkowitz) as per their stipulation, note 24 *supra*.

Judgment in accordance with opinion.

VAN GRAAFEILAND, *Circuit Judge,* dissenting:

In February 1971, a medical malpractice action against Brookdale Hospital was reached for trial in New York State Supreme Court. The suit had been brought on behalf of Steven Slotkin, an infant, who allegedly sustained permanent brain damage at the time of his birth because of the improperly controlled toxemia of his diabetic mother.

The hospital had $1,200,000 of liability insurance, $200,000 of primary coverage written by Citizens Casualty Co. and a $1,000,000 umbrella policy written by Lloyds of London. The hospital's attorneys had nothing to gain by hiding from plaintiffs the existence of the umbrella policy. The insurance was there to be used; that is why the hospital purchased it.[1] If the attorneys fraudulently concealed its ex-

---

1 Ratner and appellee carriers likewise had little if anything to gain by concealing the existence of the umbrella policy. The maximum exposure of Citizens Casualty Co., Ratner's employer, was $50,000, all of which was on the table when the several settlement offers were made. Fraudulent settlement for $185,000

istence, they exposed themselves to personal liability which might not be covered by their own malpractice policy.[2] They would be liable to the plaintiffs and would also be required to indemnify all of the hospital's carriers held derivatively liable because of their wrongdoing. *Oceanic Steam Navigation Co. v. Compania Transatlantica Espanola*, 134 N.Y. 461, 467 (1892); *Opper v. Tripp Lake Estates, Inc.*, 274 App. Div. 422, 423-24 (1948), *aff'd*, 300 N.Y. 572 (1949); 42 C.J.S. *Indemnity* § 21 at 597-98.

Notwithstanding the foregoing, the existence of the Lloyds policy was not disclosed, and, as a result, the attorneys and claim representative Ratner have been sued for fraud and misrepresentation. Although the personal liability to which these men are thus exposed is in no way determinative of the issues on this appeal, it precludes us from comfortably rationalizing that this litigation involves merely the shifting of liability from one insurance carrier to another. It also highlights what I believe to be the basic weakness in plaintiffs' case.

The fundamental issue on this appeal is whether plaintiffs could reject Lloyds' offer to make $1,000,000 in coverage available if the trial were recommenced, successfully importune the state judge to approve settlement for $185,000, and thereafter re-

---

would save the seven reinsurance carriers a total of $15,000. In the case of one carrier, which carried only five percent of the reinsurance, the saving would amount to $750.

2 As a general rule, malpractice policies do not insure against fraudulent acts or omissions. *See, e.g., St. Paul Fire & Marine Insurance Co. v. Clarence-Rainess & Co.*, 70 Misc. 2d 1082, 1083 (1972), *aff'd*, 41 App. Div. 2d 604 (1973). The McGraths' policy so provides, and they are being defended by their insurance carrier pursuant to a stipulation that the carrier will not be responsible for the payment of any judgment aginst them which sounds in fraud.

cover substantial damages from appellees because the settlement approved at plaintiff's insistence did not represent their claim's true settlement value. I believe that the district court was correct in concluding that they could not.

I disagree at the outset with the majority's interpretation of the New York law governing infants' settlements. Prior to court approval, the settlement herein was not, as the majority would have it, only "technically" inchoate. Until the compromise was approved by the court in the manner prescribed by the New York statutes, it was not a legal settlement, and it could not be enforced by either the plaintiffs or the defendants.

Two former New York State Supreme Court Justices, one of whom is now a Judge of the New York Court of Appeals, testified as experts on the trial below. They were in agreement that Judge Williams could have, and should have, declined to sign the order approving the $185,000 settlement, in which event the stipulation of compromise would have had no binding effect. Plaintiffs' trial counsel in the state court action also testified that "Judge Williams had a right to refuse to sign the compromise papers, which would have nullified the entire settlement proceedings" and that "if he didn't sign the papers I did know that the settlement is a nullity." These were correct statements of the New York law.

Infant plaintiffs are wards of the court, *Glogowski v. Rapson,* 20 Misc. 2d 96, 97 (1959), and New York's "rules of practice abound in provisions of ancient origin designed to safeguard their legal rights." *Greenburg v. New York Central and H.R.R.R. Co.,* 210 N.Y. 505, 509 (1914). Today's rules, as embodied

in CPLR 1207 and 1208, require that applications for approval of an infant settlement be made upon motion supported by affidavits of the infant's representative and attorney setting forth certain specified facts.[3] The order entered on such a motion has the effect of a judgment. CPLR 1207; *Krichmar v. Krichmar*, 42 N.Y. 2d 858, 860 (1977).

Until the requirements of CPLR 1207 and 1208 are complied with, there can be no binding compromise agreement. *Farraro v. Stripekis*, 60 App. Div. 2d 861 (1978); *Cagliotti v. Medi-Cab, Inc.*, 52 App. Div. 2d 544 (1976); *Valdimer v. Mount Vernon Hebrew Camps, Inc.*, 9 App. Div. 2d 900, *aff'd*, 9 N.Y. 2d 21 (1961); 28 N.Y. Jur. *Infants* § 63. Any compromise reached in anticipation of a court-approved settlement is unenforceable, because the statutes prescribe the only method by which a defendant may secure a binding release from an infant. 2 Weinstein, Korn & Miller, *New York Practice* § 1207.06.[4]

It is undisputed that plaintiffs had full knowledge of the amount of Brookdale's insurance coverage some three months before they succeeded in securing

---

3 The applicable Rules of Practice of the Appellate Division, First Department, also required that an application for court approval of a settlement of a claim or cause of action belonging to an infant be made as provided in CPLR 1207 and 1208. *See* 22 Codes, Rules and Regulations of the State of New York § 603.8. If the procedures mandated by these sections were not complied with, the application for approval of the settlement had to be denied. *Speights v. Motor Vehicle Accident Indemnification Corp.*, 75 Misc. 2d 937 (1973); *Bittner v. Motor Vehicle Accident Indemnification Corp.*, 45 Misc. 2d 584 (1965).

4 If the state court judge had indicated that he would not sign the order of settlement, one wonders how much either of my learned colleagues would have been willing to pay for an assignment of plaintiffs' rights under the "technically inchoate" agreement.

court approval. It is also undisputed that plaintiffs importuned Judge Williams to approve the $185,000 settlement in order that they might bring suit against appellees for fraud. In so doing, they completely removed from the case one of the requisite elements for a claim in fraud, *i.e.*, reliance. To recover for misrepresentation, a plaintiff must establish that he relied upon the misrepresentation and that the damages for which recovery is sought flowed from the reliance. *Ochs v. Woods*, 221 N.Y. 335, 338, 340-41 (1917); *Karscher v. DeWald*, 246 App. Div. 21, 22-23 (1935); 24 N.Y. Jur. *Fraud and Deceit* § 25 at 224.[5]

Contrary to Judge Oakes' assertion, the damages which are the basis of plaintiffs' claim for recovery did not occur at the time the state action was discontinued and the jury dismissed. Although plaintiffs did agree to a discontinuance in reliance upon appellees' misstatements, and, as a result, undoubtedly sustained some damage, this was not the damage for which they sued. The jury's verdict was based upon the allegedly inadequate settlement which plaintiffs insisted the Court approve after they had full knowledge of the facts. Under the doctrine of *volenti non fit injuria*, recovery cannot be had where an agreement has been consummated in this manner. *Oleet v. Pennsylvania Exchange Bank*, 285 App. Div. 411

---

5 "A false representation is not cognizable by the law as deceit unless it is believed and relied upon as an inducement to action."

Ochs v. Woods, *supra*, 221 N.Y. at 338.

"The maker of a fraudulent misrepresentation is not liable to one who does not rely upon its truth but upon the expectation that the maker will be held liable in damages for its falsity."

3 *Restatement of Torts* § 548.

(1955); *Kelly v. Otis Elevator Co.*, 283 App. Div. 363 (1954), *aff'd*, 308 N.Y. 805 (1955); *General Valuations Co. v. City of Niagara Falls*, 253 App. Div. 156, *aff'd on this point*, 278 N.Y. 273 (1938); *Commodity Credit Corp. v. Rosenberg Bros. & Co.*, 243 F.2d 504 (9th Cir.), *cert. denied*, 355 U.S. 837 (1957).

The rationale of the foregoing cases is not confined to commercial contracts. The proper measure of damages is inseparably connected with the right of action. *Chesapeake & Ohio Ry. v. Kelly*, 241 U.S. 485, 491 (1915), and two basic and closely related doctrines of the law of damages are (1) that a wrongdoer is responsible only for the natural and proximate consequences of his misconduct, *Steitz v. Gifford*, 280 N.Y. 15, 20 (1939), and (2) that an injured person must take reasonable steps to minimize his losses. *Pearlstein v. Scudder & German*, 527 F.2d 1141, 1145 (2d Cir. 1975); *Industrial Sugars, Inc. v. Standard Accident Insurance Co.*, 338 F.2d 673, 676 (7th Cir. 1964). Under the doctrine of "avoidable consequences", a plaintiff cannot recover damages resulting from consequences he could reasonably have avoided. *Restatement of Torts* § 918. Put another way, if a plaintiff could reasonably have avoided the consequences, the defendant's wrongdoing is not the proximate cause of their occurrence. *McClelland v. Climax Hosiery Mills*, 252 N.Y. 347, 358-59 (1930) (Cardozo, C.J., concurring); *W. B. Moses & Sons v. Lockwood* 295 F. 936, 941 (D.C. Cir. 1924).

Here, the plaintiffs deliberately and knowingly rejected $1,000,000 in available insurance in order that they might impose liability upon appellees. In view of this conduct, I am at a loss to understand the ma-

jority's statement that "[p]laintiff's here never had the opportunity to avoid any injury." Plaintiffs had every opportunity to avoid the injury for which they now seek recovery. It is no answer to say that, if they wanted to take advantage of Lloyds' umbrella policy, they would have to present their proof a second time. They would have to do this in any event in their fraud action against appellees.[6] It is likewise no answer to say that plaintiffs would have to rescind their settlement and give up $185,000. Until court approval was obtained, plaintiffs had no binding settlement, no $185,000, and no right to demand payment of it. Moreover, there is nothing in the record to indicate that appellee insurers would have withdrawn their settlement offer if the case were ordered retried. Indeed, because appellees' entire $200,000 would have to be expended before the $1,000,000 in umbrella coverage became available, appellees would almost certainly have offered the full amount of their policies in order that plaintiffs would not be denied the benefit of the umbrella coverage.

---

6 The majority opinion would lead one to believe that the retrial of an action is such a rare occurrence as to justify drastic sanctions for the party causing it. This simply is not so. Retrials are constantly being ordered with no greater sanctions imposed than the liability for additional costs and disbursements. *See, e.g., Dunbar v. Ingraham*, 275 App. Div. 898 (1949).

I am not impressed by the argument that appellants' doctors could not have been compelled to give opinion testimony if the state court action had been retried. The doctors could have been subpoenaed and required to testify as to all of their factual observations. Had they then refused to repeat the expert testimony they had given on the prior trial, it could have been read into evidence. CPLR 4517. It is inconceivable that any doctor, sitting on the witness stand, would forego a lucrative fee for testifying as an expert, and at the same time put the medical profession and his own standing in disrepute, by repeating his factual observations but refusing to reiterate his opinion based thereon.

"To err is human" is a phrase inscribed in the records of antiquity. Where, as here, defendants have erred, the law does not impose upon plaintiffs the divine obligation of forgiveness. Justice will not be served, however, if this Court accepts financially motivated retaliation as an alternative. Because I believe this is what my colleagues are doing in the instant case, I respectfully dissent.

Assuming, for the argument only, that the district judge erred in dismissing the complaint as to the individual defendants, he was nonetheless correct in dismissing as against the reinsurers. The sole obligation of the seven reinsurers was the contractual duty to indemnify Citizens Casualty Co. for the amount of its policy loss in excess of $50,000, the share of reinsurance as between carriers varying from five percent to fifteen percent. Although settlement of plaintiffs' case for $185,000 resulted in a saving for the five percent reinsurer of only $750, my colleagues hold nonetheless that a jury could find that Ratner was acting as this carrier's agent when he fraudulently concealed the existence of Lloyds $1,000,000 policy. They say that the "evidence could support a finding that Ratner's agency relationship with Citizens and with the reinsurers was the same." With all due respect for my brothers' perspicacity, I do not find this to be so.

Ratner was a paid employee of Citizens, the company whose policy was issued to Brookdale and whose duty it was to handle all liability claims against the hospital. The reinsurers' sole obligation was to Citizens, *i.e.*, the obligation to indemnify. *Greenman v. General Reinsurance Corp.*, 237 App. Div. 648, 649 (1933).

> "Reinsurance, to an insurance lawyer, means one thing only—the ceding by one insurance company to another of all or a portion of its risks for a stipulated portion of the premium, in which the liability of the reinsurer is solely to the reinsured which is the ceding company, and in which contract the ceding company retains all contact with the original insured, and handles all matters prior to and subsequent to loss."

13 Appleman, *Insurance Law and Practice* § 7681 at 479-80.

Giving plaintiffs the benefit of the broadest reading of all the testimony concerning the in-court and out-of-court statements of Ratner,[7] his sole contact with the reinsurers was through telephone conversations with their "claims people" in which either he or his subordinates at Citizens attempted to "sell them", to "push them", to "get them to up the offer". This, my brothers say, is sufficient to permit a finding that Ratner was acting as the agent for all seven "pushees".[8] I disagree.

---

7 The only testimony given by Ratner was by deposition, in which he said that he obtained the consent of the reinsurers to settle for $185,000. I disagree with the majority's holding that this established an agency relationship with the reinsurers and opened the floodgates to any hearsay statements of Ratner that plaintiffs were thereafter prepared to offer. *See O.A. Skutt, Inc. v. J. & H. Goodwin Ltd.*, 251 App. Div. 84, 86 (1937); *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 576 (2d Cir. 1961). However, for purposes of this opinion, I need not enter the dispute between my colleagues and Judge Pollack concerning out-of-court declarations. Accepting all of the testimony offered by plaintiffs, it is nonetheless insufficient to establish that Ratner was the agent of the seven reinsuring carriers.

8 My brothers do not say whether Ratner's subordinates at Citizens were also acting as agents for the reinsurers.

Agency is a fiduciary relationship which arises when one acts on behalf of another and is subject to his control. *Northern v. McGraw-Edison Co.*, 542 F.2d 1336, 1343 (8th Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); *Aetna Insurance Co. v. Glens Falls Insurance Co.*, 453 F.2d 687, 690-91 (5th Cir. 1972); *Globemaster Midwest, Inc. v. United States*, 337 F. Supp. 465, 470 (Cust. Ct. 1971); *Restatement (Second) of Agency* § 1. The purported agent must have been assigned and instructed by the purported principal to carry out the task he was performing. *Paroutian v. United States*, 370 F.2d 631, 632 (2d Cir.), *cert. denied*, 387 U.S. 943 (1967).

There is not one iota of evidence to establish that Ratner, the Assistant Vice President of Citizens, was under the control and supervision of the reinsurers.[9] He denied categorically that he was or that he acted on their behalf. Moreover, the testimony that Ratner attempted to "sell" and "push" these companies, the only testimony offered to establish agency, is completely at odds with the fiduciary obligation that Ratner, as an agent, would owe.

In today's world of high verdicts, where substantial insurance coverage is a must, it is rare indeed that the entire risk on a policy is carried by the named insurer. Reinsurance is the rule rather than the exception. Under my colleagues' version of the law, a reinsuring carrier would not dare discuss set-

---

9 The securing of consent is not the equivalent of submission to control. For example, the approval of at least one other judge is required every time an opinion is filed in this Court. If this were sufficient to make the writing judge the agent of his concurring brothers, this Court might at one time have lost several of its most able and distinguished members. *See United States v. Manton*, 107 F.2d 834, 846 (2d Cir. 1939), *cert. denied*, 309 U.S. 664 (1940).

tlement of a case with the primary carrier's claim representative for fear that it would be making him its agent. This is not, and should not be, the law. *See Aetna Insurance Co. v. Glens Falls Insurance Co., supra,* 453 F.2d at 690-91. Where, as here, plaintiffs failed completely to establish the existence of a principal-agent relationship, the district court had no alternative but to dismiss the complaint as to the reinsuring carriers. *Cramer v. Hoffman,* 390 F.2d 19, 23 (2d Cir. 1968); *Hedeman v. Fairbanks, Morse and Co.;* 286 N.Y. 240, 248 (1941).

CONCLUSION

In dismissing the infant's claim against the reinsurers and in setting aside the verdict against the remaining defendants, Judge Pollack was performing a most unpleasant task. He was, however, carrying out his duties in accordance with the highest traditions of his office. I have written at some length in a losing cause because I want to make clear that, in the opinion of one appellate judge, the law of New York gave Judge Pollack no happier choice.

I would affirm.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Filed: Dec. 10, 1979

No. 78-7167

Steven John Slotkin, an infant by his mother and natural guardian, Charlotte Slotkin, and Charlotte Slotkin, as Executrix of the Estate of Bert Slotkin, deceased,

Appellants,

v.

Citizens Casualty Co. of New York, Allstate Insurance Co., American Motorists Insurance Co., American Mutual Insurance Co. of Boston, Employers Mutual Liability Insurance Co. of Wisconsin, Guaranty Reinsurance Co., Urbaine Fire Insurance Co., Grange League Insurance Co., National Casualty Co., Hardware Mutual Casualty Co., Arkwright-Boston Manufacturers Mutual Insurance Co., Paul Ratner, George Berkowitz, Christopher McGrath, Jr., and John McGrath,

Appellees.

ORDER ON PETITIONS FOR
REHEARING OF PETITIONERS
CHRISTOPHER McGRATH, JR.,
AND JOHN McGRATH

Petitioners Christopher McGrath, Jr., and John McGrath move separately for rehearing and rehearing en banc of

this court's August 29, 1979, decision. Christopher McGrath, Jr., claims that the court distorted New York law, John McGrath that the verdict below was misinterpreted with respect to him and that he should not have been held liable on a partnership theory.

PETITION OF CHRISTOPHER McGRATH, JR.

Petitioner Christopher McGrath, Jr., claims that the opinion both misconstrues the facts of his involvement and applies the wrong law. The first argument remains unconvincing. The second is inaccurate. It is petitioner who misstates the scienter requirements of New York law -- Burgundy Basin Inn v. Watkins Glen Grand Prix, cited slip op. at 4441, petitioner acted with intent.

Petitioner's best argument is that the judicially approved New York state settlement had the force of a judgment, barring plaintiff from instituting and appealing his federal case. He places primary reliance on Holm v. Shilensky, 388 F.2d 54 (2d Cir. 1968), in which this court, also applying New York law in diversity jurisdiction, declined to re-

view an earlier Nevada decree allegedly obtained via fraud. But the ratio decidendi of Holm is soley that New York courts must give full faith and credit to the decree of the rendering state, and since the decree would not have been reviewable in Nevada, a New York court could not review it. Holm supports petitioner only if New York forbids the sort of challenge to an earlier decree here permitted. In support of that position, petitioner adduces Grossman v. Kass, 124 N.Y.S.2d 416 (Sup. Ct. 1953). Grossman is, however, effectively supplanted by Byrnes v. National Union Insurance Co., cited slip. op. at 4435, quoted approvingly in National American Corp. v. Federal Republic of Nigeria, 597 F.2d 314, 323 (2d Cir. 1979). Byrnes holds that when plaintiffs do not ask for rescission of a release (which, as in the instant case, was judicially approved) but rather affirm it and sue for damages for fraud in its procurement, the new trial is legitimate. 310 N.Y.S.2d at 782. It is not barred by res judicata because it is for a different, albeit related, cause of action. See Inman v.

Merchants Mutual Casualty Co., cited slip op. at 4435, 83 N.Y.S.2d at 803.

PETITION OF JOHN McGRATH

The opinion reinstates the first general verdict against all defendants. Petitioner John McGrath's new, separate counsel makes the new arguments that that verdict was vague, tentative, uncertain, and possibly not unanimous, see slip op. at 4430 n. 13, and that the judge sent the jury back for further deliberation before petitioner had an opportunity to poll them, as was his right under Humphries v. District of Columbia, 174 U.S. 190, 194 (1899). Accordingly, the argument runs, it is unfair to hold petitioner liable under the first verdict -- the jury may or may not have intended to find against him.

Even accepting this as true the second verdict rather than the first would have to be reinstated. The jury therein found petitioner liable but assessed no monetary damages against him. While in state courts there is some disagreement as to whether a verdict against

defendant for $0.00 amounts to judgment for plaintiff or defendant, see Annotations, 116 A.L.R. at 834; 49 A.L.R.2d at 1331, 1334, most federal cases interpret the verdict as a finding of defendant's liability to a given extent, viz., $0, e.g., Joseph v. Rowlen, 425 F.2d 1010, 1013 (7th Cir. 1970) ("We believe any distinction between an award of 6¢ and '0' damages is more of form than substance"); Wingerter v. Maryland Casualty Co., 313 F.2d 754, 756 (5th Cir. 1963) (verdict neither invalid nor ambiguous, no retrial needed); but see Association of Western Railways v. Riss & Co., 299 F.2d 133, 135 (D.C. Cir.), cert. denied, 370 U.S. 916 (1962) (remanding for entry of judgment for defendant since finding of no damage meant plaintiff had not proven claim).

Under this interpretation, the jury by its second verdict found petitioner a joint tortfeasor. Acting under erroneous apportionment instructions, however, it allocated none of the damages to him. This allocation, however, must be set aside under New York law which holds tortfeasors jointly and severally liable.

Therefore, even if petitioner should be judged by the second rather than the first verdict, his liability remains the same.

We are persuaded, however, that the alternative holding finding John McGrath liable as a matter of law for his partner's torts, slip op. at 4444, is erroneous and should be eliminated. The case was not tried on this theory; were it, John McGrath could have taken steps, now foreclosed, to decrease his liability. He could have joined as a defendant both his partnership, see N.Y.C.P.L.R. § 1025, and his other partner, see N.Y. Partnership Law § 24. He may not be able hereafter to sue them for contribution. Because of the prejudice to petitioner of affirming on the basis of a theory not advanced below, the alternative holding should be and it hereby is stricken from the opinion.

The petitions for rehearing are otherwise each denied. Judge Van Graafeiland adheres to his dissent.

/s/James L. Oakes

/s/Murray I. Gurfein
Circuit Judges.

Order Declining Action on Suggestion for Rehearing *In Banc*

Filed January 31, 1980

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Docket No. 78-7167

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 31st day of January, one thousand nine hundred and eighty.

STEVEN JOHN SLOTKIN, an infant by his mother and natural guardian CHARLOTTE SLOTKIN, and CHARLOTTE SLOTKIN, as Executrix of the Estate of Bert Slotkin, deceased,

Plaintiffs-Appellants,

v.

CITIZENS CASUALTY CO. OF NEW YORK, ALLSTATE INSURANCE COMPANY, AMERICAN MOTORISTS INSURANCE CO., AMERICAN MUTUAL INSURANCE CO. OF BOSTON, EMPLOYERS MUTUAL LIABILITY INSURANCE CO. OF WISCONSIN, GUARANTY REINSURANCE CO., URBAINS FIRE INSURANCE CO., GRANGE LEAGUE INSURANCE CO., NATIONAL CASUALTY CO., ARKWRIGHT-BOSTON MFRS. MUTUAL INSURANCE COMPANY, HARDWARE MUTUAL CASUALTY CO., PAUL RATNER, GEORGE BERKOWITZ, CHRISTOPHER MCGRATH, JR. and JOHN MCGRATH,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by

counsel for the appellee Christopher McGrath, Jr., and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Due to his untimely death on December 16, 1979, Judge Gurfein took no part in the consideration of the petition to rehear this matter en banc.

/s/ IRVING R. KAUFMAN

Chief Judge
IRVING R. KAUFMAN

Order Extending Time to File Petition for Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

No. A-730

CHRISTOPHER MCGRATH, JR.,

Petitioner,

v.

STEVEN JOHN SLOTKIN, ETC., ET AL.

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 8, 1980.

/s/ THURGOOD MARSHALL

Associate Justice of the Supreme Court of the United States

Dated this 29th
day of February, 1980.

No. 79-1571, No. 79-1524, No. 79-1719 and No.

Supreme Court, U. S.
FILED
OCT 1 1980
RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1571

CHRISTOPHER McGRATH, JR.,

Petitioner,

v.

STEVEN JOHN SLOTKIN, an infant by his mother and natural guardian, CHARLOTTE SLOTKIN, and CHARLOTTE SLOTKIN, as Executrix of the Estate of BERT SLOTKIN, deceased,

Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Second Circuit

(Additional titles appear on reverse side of this cover)

RESPONSE OF GEORGE BERKOWITZ TO THE ABOVE TITLED PETITIONS FOR WRITS OF CERTIORARI

SOLOMON M. CHESER

TELL, CHESER, BREITBART & LEFKOWITZ
116 John Street
New York, New York 10038
(212) 233-5100

Attorney for George Berkowitz

TABLE OF CONTENTS

	PAGE
STATEMENT	2
POINT—Should the Court grant certiorari, its review should exclude from consideration the dismissal of the complaint against Berkowitz	3
CONCLUSION	4

Cases Cited

Connecticut Railway & Light Co. v. Palmer, 305 U.S. 493	3
General Talk Pictures Corp. v. Western Electric Co., 304 U.S. 175	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1571

CHRISTOPHER McGRATH, JR.,

Petitioner,

v.

STEVEN JOHN SLOTKIN, an infant by his mother and natural guardian, CHARLOTTE SLOTKIN, and CHARLOTTE SLOTKIN, as Executrix of the Estate of BERT SLOTKIN, deceased,

Respondents.

No. 79-1524

CITIZENS CASUALTY COMPANY OF NEW YORK,

Petitioner,

v.

STEVEN JOHN SLOTKIN, etc.,

Respondents.

No. 79-1719

AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON,

Petitioner,

v.

STEVEN JOHN SLOTKIN, etc.,

Respondents.

No.

JOHN McGRATH,

Petitioner,

v.

STEVEN JOHN SLOTKIN, etc.,

Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONSE OF GEORGE BERKOWITZ TO THE ABOVE TITLED PETITIONS FOR WRITS OF CERTIORARI

Statement

This is submitted on behalf of George Berkowitz in connection with the above titled Petitions for Writs of Certiorari. Mr. Berkowitz was a defendant and defendant-respondent in the courts below.

POINT

Should the Court grant certiorari, its review should exclude from consideration the dismissal of the complaint against Berkowitz.

The United States Court of Appeals for the Second Circuit unanimously affirmed the District Court's dismissal of the complaint against Berkowitz although it reversed that Court's dismissal of the complaint against all other defendants. Thus with regard to Berkowitz, the District Court and the Court of Appeals were in concurrence.

This Court has held that concurrent findings should "not be disturbed unless plainly without support". *General Talk Pictures Corp.* v. *Western Electric Co.,* 304 U.S. 175, 178.

None of the petitions names Berkowitz as a respondent. None requests a review of the dismissal of the complaint against Berkowitz. None expresses itself aggrieved by the dismissal of the complaint against Berkowitz. It is this Court's stated policy "to review only the matter which this Court was advised aggrieved petitioner." *Connecticut Railway & Light Co.* v. *Palmer,* 305 U.S. 493, 497. Accordingly, we respectfully suggest, that the dismissal of the complaint against Berkowitz is not a matter for this Court's review.

The affirmance of the dismissal of the complaint against Berkowitz was not grounded on any constitutional question. Rather, the Court of Appeals' affirmance of the dismissal of the complaint against Berkowitz resulted solely from its finding of fact that there was insufficient evidence to sustain the charge of fraud alleged against him.

CONCLUSION

The dismissal of the complaint against Berkowitz should not fall within the ambit of any review that this Court may grant of the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

SOLOMON M. CHESER

TELL, CHESER, BREITBART & LEFKOWITZ
116 John Street
New York, New York 10038
(212) 233-5100

Attorney for George Berkowitz

No. 79-1571

Supreme Court, U. S.
FILED
OCT 8 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1979

CHRISTOPHER McGRATH,

Petitioner,

vs.

STEVEN JOHN SLOTKIN, an infant by his mother and natural guardian, CHARLOTTE SLOTKIN and CHARLOTTE SLOTKIN, as Executrix of the Estate of Bert Slotkin, deceased,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

SCHNEIDER, KLEINICK, FRIEDMAN, MILLER & WEITZ
Counsel for Respondents
11 Park Place
New York, New York 10007
(212) 962-4760

TOBEROFF & GOULD
Attorneys for Respondents
350 Fifth Avenue
New York, New York 10001
(212) 736-3250

THEODORE H. FRIEDMAN
MAX TOBEROFF
FRED R. PROFETA, JR.
Of Counsel

4060 LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 New York, N.Y. (212) 840-9494 Philadelphia, Pa. (215) 563-5587 Washington, D.C. (202) 783-7288

TABLE OF CONTENTS

Page

Preliminary Statement 1

Statement of Facts 4

Reasons for Denying the Writ:

I. The federal action cannot possibly be construed as a collateral attack on a state court judgment. 9

II. There was ample evidence to support the jury finding of scienter under New York law. 12

Conclusion 14

TABLE OF CITATIONS

Cases Cited:

Crouse v. McVickar, 207 N.Y. 213 (1912) 10, 11

Erie R.R. v. Tompkins, 304 U.S. 64 (1938) 2, 3

Hadcock v. Osmer, 153 N.Y. 604 (1897) 13

Strong v. Strong, 102 N.Y. 69 (1886) 10

Ultramares Corp. v. Touche, 255 N.Y. 170 (1931) 13

Verplank v. Van Buren, 76 N.Y. 247 (1879) 10

Young v. New York State E. & G. Corp., 184 Misc. 1013, 55 N.Y.S. 2d 150 (Sup. Ct. Steuben Co., 1945), aff'd, 270 App. Div. 794, 60 N.Y.S. 2d 303 (4th Dept. 1946) 10

79-1571

In The

Supreme Court of the United States

October Term, 1979

CHRISTOPHER McGRATH,

Petitioner,

vs.

STEVEN JOHN SLOTKIN, an infant by his mother and natural guardian, CHARLOTTE SLOTKIN, and CHARLOTTE SLOTKIN, as Executrix of the Estate of Bert Slotkin, deceased,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The petition filed by petitioner Christopher McGrath is one of three petitions evolving from the same action below. Respondents have already submitted papers opposing the petition of John McGrath (No. 79-1535) and are submitting opposition papers to the petition of American Mutual (No. 79-1719) concurrently with the instant submission in opposition.

The petitioner raises two arguments not made in the other petitions. Petitioner claims that the fraud action was an impermissible collateral attack on a state court judgment, *i.e.*, the infant's compromise order approving the settlement below the stated (actually misstated) policy limits. In this regard, petitioner characterizes the fraud action as a "second bite of the apple" that "would open the proverbial flood gates" (Petition at pages 10, 15). Petitioner further claims that the Court of Appeals violated the principles established in *Erie R.R. v. Tompkins,* 304 U.S. 64 (1938) by failing to apply the laws of New York State with respect to the scienter requirement for fraud. Each claim is, of course, an attempt to elevate a question of New York law to an issue of constitutional dimensions.

In point of fact, there was no "collateral attack" on a state court judgment. The fact that the infant plaintiff and his mother were fraudulently induced to accept a settlement for far less than the true worth of their malpractice cause of action and the further fact that such settlement was a final disposition of the malpractice claim were necessary elements of the fraud claim. Nor, as we shall show, is there anything novel or remarkable about a fraud action premised on fraudulent inducement to enter into a final settlement of a cause of action. The federal court action sounding in fraud was not a collateral attack on the final settlement of the malpractice action. And, in this context, petitioner's reference as to "a second bite of the apple" is, at the least, misplaced. The entire point of the fraud action was that petitioner's knowing misrepresentations prevented the opportunity for a first bite of the apple.

As for petitioner's claim that the Court of Appeals, a) failed to apply the laws of New York State as to scienter in violation of the *Erie* doctrine, and, b) held that "gross negligence" was sufficient scienter, neither representation is factually correct. First, the decision below was clearly based on New York law. That portion of the decision below addressing the action against

petitioner cites only New York cases (47a-48a).[1] There was no determination to apply federal law or the law of any other jurisdiction. What petitioner really claims is that the court erred in its application of New York law, not that it chose not to apply New York law. Of course, a mere error in the application of state law is just that and is not a refusal to apply state law nor a violation of *Erie*. Petitioner's assertions to the contrary, assertions which reflect a "through the looking glass" logic, clearly reveal that counsel for petitioner suspect, quite rightly, that an alleged error of state law reviewed and re-reviewed by the Court of Appeals is a less than compelling basis for certiorari in the Supreme Court of the United States. In any event, as we shall show, the Court of Appeals did *not* interpret New York law as holding that "gross negligence" is sufficient scienter for fraud.

Finally, as to petitioner's frequent attempts to invoke equitable considerations with references to "a second bite of the apple", and to "floodgates", and to liability for incorrect statements "however innocent", it suffices to note that respondent is a brain-damaged child who was deprived of adequate compensation because a group of attorneys fraudulently induced him to settle for an inadequate amount. Unless the actions of petitioner and the other individual defendants are typical of conduct employed by attorneys, and we hope and believe such is not the case, there will be no "flood of litigation". Furthermore, no one, not respondents, not the trial court in its charge to the jury (reprinted at note 20 of the opinion below, appendix page 48), and not the Court of Appeals, ever suggested that petitioner was liable for all misrepresentations "however innocent". It is precisely because the misrepresentations were not at all innocent that the jury found liability and the Court of Appeals determined that there was sufficient evidence to support the verdict.

---

1. All such references refer to pages in petitioner's appendix.

The fact that several attorneys were found liable under New York law for repeated and fraudulent misrepresentations to the attorneys for a brain-damaged infant regarding insurance coverage does not raise issues in law or equity that would warrant a writ of certiorari. Accordingly, respondents respectfully requests that the petition be denied in all respects.

STATEMENT OF FACTS

The instant action for fraud evolves from a state court malpractice case brought by the respondents herein, a brain-damaged child and his mother (22a-23a). On March 4, 1971, the parties to the malpractice action held a settlement conference before New York State Supreme Court Justice Oliver D. Williams (30a). At that time, petitioner Christopher McGrath, the attorney for Citizens Casualty who was representing the defendant hospital, told the respondents' attorney, Mr. Max Toberoff, that the total insurance coverage, including reinsurance, was $200,000. Indeed, Mr. McGrath stated that he *knew* the total coverage was only $200,000. The following exchange occurred on the record:

> "Mr. [Christopher McGrath]: *The total coverage is $200,000, including reinsurance.*
>
> Mr. Toberoff: So far as you are concerned.
>
> Mr. McGrath: Correct.
>
> Mr. Toberoff: You have no knowledge as to whether the hospital has additional coverage with other companies? You have no knowledge of that?
>
> Mr. McGrath: *I do have knowledge of that.* We were the only company on the line at that time" (emphasis added) (30a-31a, n.7).

Mr. McGrath further stated that his knowledge was based on an examination of his file.

Based upon Mr. McGrath's representations and other representations as to the policy limits, respondents entered into a stipulation of settlement on March 4, 1971 (reprinted at 31a). The stipulation settled the malpractice claim for $185,000, $15,000 less than the stated policy limits.

In point of fact, there was an additional $1 million in reinsurance as of the time Mr. McGrath adamantly insisted that the coverage was only $200,000 (34a). Moreover, his own file, the file he insisted showed insurance for only $200,000, was rife with correspondence indicating the fact and amount of the reinsurance (32a).

A week to ten days after the parties entered into the stipulation on the record, Christopher McGrath, apparently on the insistence of Ratner, advised Justice Williams and Toberoff of the $1 million in excess insurance (33a-34a). Justice Williams, who had not yet signed an infant's compromise order under CPLR §1207, then held a conference on March 31, 1971 (34a).

As of this time, respondents could have avoided settlement and asked for a retrial of the malpractice claim. However, Mrs. Slotkin, who had testified at trial, had not fully recovered from a heart attack and her physician stated that she should not testify again (36a). Also, all of respondents' expert witnesses indicated that they could not testify again (*id.*). In this regard, the Court of Appeals found that "although it is true that plaintiffs could have avoided going through with the settlement, this does not diminish the prejudice that they have already suffered by irrevocably changing their position" (44a). As the Court of Appeals noted:

> "Plaintiffs have never had the opportunity to avoid any injury. Plaintiffs were already injured,

> and their only choices were to accept the settlement and sue for fraud or to retry the malpractice case with all that retrial involved in terms of obtaining witnesses and the like. Given these choices, their decision to proceed by way of the fraud action was understandable . . ." (44a-45a).

On June 4, 1971, Justice Williams signed an infant's compromise order approving the settlement (37a). As of this time, he and the parties knew full well that respondents intended to bring an action sounding in fraud (*id.*).

A full jury trial of respondents' fraud case was held in the District Court for the Southern District of New York before Judge Pollack. As might be expected, the trial was protracted for respondents were, in effect, required to try two cases in one — the merits of the case sounding in fraud and the merits of the state court malpractice case (the case within the case).

With respect to the scienter requirement for fraud, Judge Pollack charged the jury:

> "A person makes a misrepresentation with scienter, meaning knowingly, if he knows that the representation is false, or he neither knows nor cares whether it is true or false, of if he has no genuine belief that it is true. *If a speaker actually believes that what he says is true, then he does not act with scienter, even though that belief is negligent, in that a reasonable man would not believe it.*
>
> *There is one exception to what I have just told you. If you find that the defendant whom you are considering intended that it should be*

> *understood that what he said about the hospital's insurance was true to his personal knowledge and intended that the plaintiffs should act on the basis of what he said, then you should find that said defendant acted with scienter if he didn't know what he [said] was true.* To this extent, a person who asserts a falsehood as true to his personal knowledge may be said to have acted with scienter, that is, knowingly, even though he believes what he says to be true" (emphasis added) (48a, n.20).

At the close of respondents' case, Judge Pollack dismissed claims against the reinsurers. At the conclusion of the trial, the jury returned a verdict in favor of respondents herein and against, among others, the petitioner herein, Christopher McGrath (50a).

Subsequent to the jury's verdict in favor of respondents, Judge Pollack granted defendants' motion for a directed verdict and dismissed respondents' complaint as to all named defendants including petitioner Christopher McGrath. Judge Pollack's decision appears on pages 1 through 16 of petitioner's appendix. A reading of that decision will clearly show that the dismissal of the complaint was based on one and only one basis — Judge Pollack's belief that, *under the law of New York,* a victim of misrepresentation waives the fraud if he proceeds to execute the agreement notwithstanding his awareness of the misrepresentation. In other words, Judge Pollack believed that, by enforcing the $185,000 settlement after they became aware of the excess coverage, respondents herein waived any claim for fraud which may have existed under New York state law.

Respondents appealed to the Court of Appeals for the Second Circuit. Respondents there claimed that the District Court erred in its interpretation of the law of the State of New

York and that the enforcement of the $185,000 settlement did not, under New York law, constitute a waiver of the claim for fraud. The Court of Appeals, in a lengthy opinion which occupies pages 20 to 57 of petitioner's appendix, agreed. Accordingly, the Court reversed the District Court's direction of judgment notwithstanding the verdict and ruled that respondents may either reinstate the verdict and judgment of $680,000 against petitioner Christopher McGrath (among others), or may retry the case against the defendants (including the present petitioner and the reinsurers and excepting defendant George Berkowitz since the court determined that there was insufficient evidence to support a verdict against defendant Berkowitz).

An analysis of the decision of the Court of Appeals reveals that said decision rested entirely on New York law. Thus, the court held:

> "The law of New York is clear that one who has been induced by fraudulent misrepresentation to settle a claim may recover damages without rescinding the settlement." (42a).

Indeed, the court explicitly stated that, even if it believed the New York rule to be unsound, "we would of course nevertheless be bound by that rule" (*id.*).

Petitioner Christopher McGrath now petitions this Court for a writ of certiorari. Several of petitioner's arguments were made in the other petitions and will not be addressed herein. In particular, petitioner's waiver argument was suitably disposed of in Judge Oakes' well-reasoned opinion. *See* pages 41-47 of petitioner's appendix. We do, however, address two points raised now by petitioner Christopher McGrath and not raised by the other petitioners.

REASONS FOR DENYING THE WRIT

I.

The federal action cannot possibly be construed as a collateral attack on a state court judgment.

Petitioner correctly notes that the signing of the infant's compromise order constituted a final disposition of the state malpractice action. However, this fails to advance petitioner's claim that the institution of the federal action sounding in fraud constituted on impermissible collateral attack on a state court judgment.[2] The fact that the action for malpractice was finally settled for the sum of $185,000 was a necessary element of the fraud claim. Absent the final settlement of the malpractice claim, respondents could not have shown any damage arising from the fraud.[3] Nor can there be any claim that the action sounding in fraud was the same cause of action as that sounding in malpractice. Clearly, it was not. The fraud claim required proof of elements not required in the malpractice action. And the recoverable damages in the fraud action were the probable worth of the malpractice claim minus those damages actually recovered in the settlement of the malpractice action.

Assuming that the settlement order, as a final disposition of an action, should be regarded as a state court judgment, it has long been New York law that a judgment procured by fraud gives rise to a separate cause of action for fraud under New

---

2. Actually, no judgment was entered in the state court action. This, of itself, indicates that the federal action cannot be construed as a collateral attack on a state court judgment.

3. Again, we do not address petitioner's claim that the acceptance of final settlement constituted a waiver of the fraud claim because this argument is, we believe, completely demolished in the opinion below. *See* pages 41a-46a of petitioner's appendix.

York law which cannot be regarded as an attack on the first judgment. The earlier judgment is viewed as one of the means of creating the damage, *Verplank v. Van Buren,* 76 N.Y. 247, 261 (1879), and, for that reason, "did not constitute an adjudication upon the question of fraud, barring the plaintiffs' claim in this action." *Strong v. Strong,* 102 N.Y. 69, 75 (1886). To the same effect is *Young v. New York State E. & G. Corp.,* 184 Misc. 1013, 55 N.Y.S. 2d 150 (Sup. Ct., Steuben Co., 1945), *aff'd,* 270 App. Div. 794, 60 N.Y.S. 2d 303 (4th Dept. 1946):

> "*The Surrogate's orders approving the settlements do not bar the prosecution of these actions.* If the actions were for rescission or based upon rescission, it might be necessary for plaintiffs first to have the orders of the Surrogate evoked or modified. McNamara v. Eastman Kodak Co., 232 N.Y. 18, 27, 133 N.E. 113, 116. Here rescission is not involved; plaintiffs have affirmed the settlements and elected to sue for damages claimed to have resulted from the fraud under the 'second' alternative mentioned in *Urtz v. New York Cent. & H.R.R. Co., supra*" (emphasis added) (55 N.Y.S. 2d at 154).

The point was clarified in *Crouse v. McVickar,* 207 N.Y. 213 (1912), a case which petitioner inexplicably cites in his petition. There, the court explained:

> "It is doubtless true that a judgment can be set aside for fraud by an action brought for that purpose, but it is the settled law (save possibly in one or two jurisdictions) that the fraud for which a judgment can be impeached must be in some matter other than the issue in controversy in the action" (207 N.Y. at 218).

In *Crouse*, the fraud was perjury committed on the very issue in dispute in the prior litigation. But this is no perjury case. We are concerned with out-of-court misrepresentation on the subject of insurance coverage, an issue entirely foreign to the state court litigation and which would, in fact, have caused a mistrial if mentioned therein.

As has been shown, New York law clearly recognizes a cause of action sounding in fraud and arising out of the final disposition of another cause of action. For this reason, petitioner's claim that the federal action constituted an impermissible collateral attack on a state court judgment is devoid of merit. This aside, it cannot be denied that the Court of Appeals considered the collateral attack argument and rejected that argument on the basis of New York law.[4] Thus, properly

---

4. The Court of Appeals held (42a, 43a):

> "The law of *New York* is clear that one who has been induced by fraudulent misrepresentation to settle a claim may recover damages without rescinding the settlement. Strong v. Strong, 102 N.Y. 69, 73, 5 N.E. 799, 800 (1886); Byrnes v. National Union Insurance Co., 84 A.D.2d 872, 310 N.Y.S.2d 781 (1970); Inman v. Merchants Mutual Casualty Co., 274 A.D. 320, 323-24, 83 N.Y.S.2d 801, 804 (1948).
>
> Even if the underlying premises of this New York rule allowing rescission on the one hand or ratification and suit for damages on the other were unsound, we would of course nevertheless be bound by that rule. The premises for rule, however, are quite sound. If all that will result from a misrepresentation is a new trial, then the party making it has everything to gain and nothing to lose. The plaintiffs would be placed at a disadvantage by a new trial; the defendants would not. If anything, defendants would benefit by having a preview of plaintiffs' case."
>
> * * *

(Cont'd)

speaking, there is no issue of federal law notwithstanding petitioner's attempt to create an issue of federal law. And, as with the other petitioners, this Court is being asked to review and reverse a lower court determination of state law. It is respectfully submitted that such request presents a less than compelling basis for a grant of writ of certiorari.

II.

There was ample evidence to support the jury finding of scienter under New York law.

As already noted, Christopher McGrath stated on the record and during the March 4 negotiations that he did know the extent of coverage and that his file "shows the limits of $200,000". At trial, his "excuse" was that he had not fully examined his file as of that time. Of course, whether this was true or not, the fact is that Mr. McGrath either lied about the insurance coverage, or at the very least, pretended to an absolute and personal knowledge he did not have. Moreover, it is clear that, as of the time the representations of absolute and personal knowledge were made, McGrath knew full well that respondents were relying on the representations of coverage. Yet, McGrath not only misrepresented the amount of insurance coverage while in possession of a file showing the true amount of coverage, he went to great pains to assure everyone that his knowledge as to the amount of coverage was complete, correct and based on actual examination of his file. It is, therefore, somewhat remarkable that petitioner characterizes the finding of liability as indicating that attorneys can now be held liable for

---

(Cont'd) "Thus, the New York rule serves to deter fraud. Moreover, the rule does not present a problem of double recovery. In this case, for example, Judge Pollack appropriately instructed the jury that in fixing damages it should deduct from the 'fair settlement value' the $185,000 received under the settlement."

misstatements "however innocent". There was nothing innocent about pretending to absolute and personal knowledge of insurance coverage, misstating the insurance coverage, and thereby inducing settlement of a brain-damaged infant's case for a fraction of its true worth.

New York law provides that scienter is satisfied by recklessness or the pretense of knowledge when knowledge there is none. *Ultramares Corp. v. Touche,* 255 N.Y. 170, 179 (1931). As noted in *Hadcock v. Osmer,* 153 N.Y. 604, 608 (1897):

> "Where a party represents a material fact to be true *to his personal knowledge,* as distinguished from belief or opinion, when he does not know whether it is true or not and it is actually untrue, *he is guilty of falsehood, even if he believes it to be true,* and if the statement is thus made with the intention that it shall be acted upon by another, who does so act upon it to his injury, the result is actionable fraud" (emphasis added).

Accordingly, the Court of Appeals held:

> "McGrath's insistence that the policy limit was $200,000, see note 7 supra, renders him liable under New York definition of scienter as 'a reckless indifference to error,' 'a pretense of exact knowledge', or 'an assertion of a false material fact' 'susceptible of accurate knowledge' but stated to be true of the personal knowledge of the representer. See Burgundy Basin Inn v. Watkins Glen Grand Prix, 51 A.D.2d 140, 379 N.Y.S.2d 873, 879 (1976), and cases cited. This, of course, attunes with the classic formulation of Judge

> Cardozo in the touchstone case of Ultramares Corp. v. Touche, Niven & Co., 255 N.Y. 170, 174 N.E. 441, 449-50 (1931)" (47a-48a).

The charge to the jury correctly stated the New York scienter requirement. The Court of Appeals concluded that there was sufficient evidence to support the jury finding of scienter. It is respectfully submitted that neither the Court of Appeals' formulation of New York law as to scienter nor the jury's finding of fact as to scienter warrants review by the Supreme Court of the United States.

CONCLUSION

For all of the above stated reasons petitioner's application for a writ of certiorari should be denied in all respects.

Respectfully submitted,

s/ Theodore H. Friedman

SCHNEIDER, KLEINICK,
FRIEDMAN, MILLER & WEITZ
Counsel for Respondents

TOBEROFF & GOULD
Attorneys for Respondents

Theodore H. Friedman
Max Toberoff
Fred R. Profeta, Jr.
Of Counsel

see 79

1524

see 79

1535

see 719